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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 410

LOUIS JACOBS, PLAINTIFF IN ERROR,

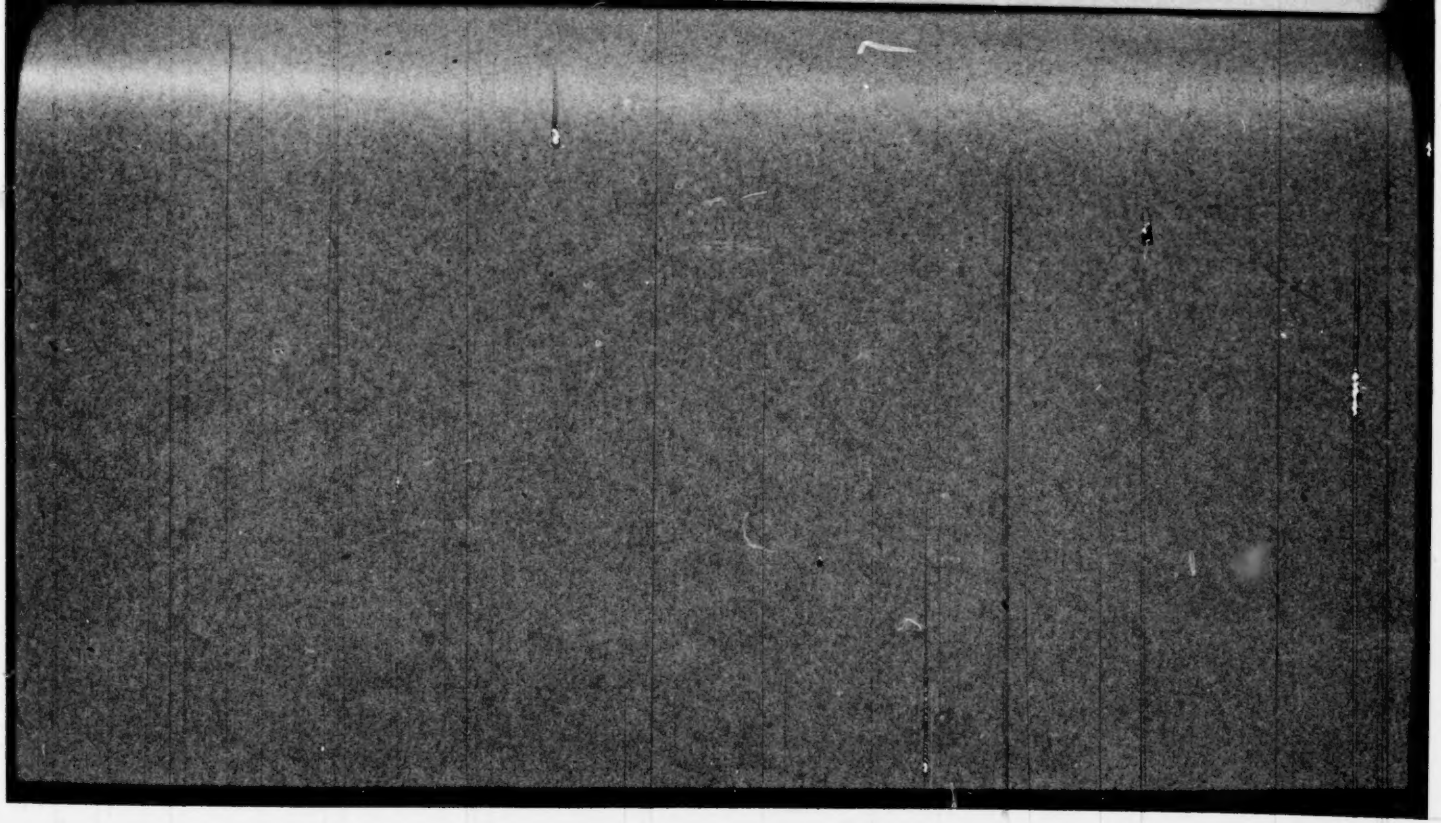
vs.

[illegible] MARKS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED SEPTEMBER 1, 1900.

(17,895.)



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INDEX.

	Original.	Print.
Caption	1	1
Affidavit of Louis J. Blum (omitted in printing)	1	—
Scire facias and return	2	1
Notice to non-residents	3	1
Transcript from circuit court of Cook county	5	2
Caption	5	2
Summons	6	3
Writ of attachment (omitted in printing)	7	—
Precipe for summons (" ")	10	—
Declaration	10	3
Affidavit of Dora Marks (omitted in printing)	13	—
Attachment bond (" ")	14	—
Appearance for defendant	15	5
Demurrer to declaration (omitted in printing)	16	—
Interrogatories to the Judkins Company (" ")	17	—
Answer of the Judkins Company (" ")	18	—
Attachment bond (" ")	19	—
Attachment bond (" ")	20	—
Bond of Michael Lewis (" ")	21	—
Demurrer to second plea (" ")	22	—
Similiters	24	5
Additional pleas	25	6
Demurrer to additional pleas (omitted in printing)	35	—

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1900.

	Original.	Print
Replication to additional pleas	36	12
Appearance for Cecelia Jacobs (omitted in printing)	37	—
Further plea	37	13
Verdict	38	13
Judgment	39	13
Order requiring defendant to give new bond (omitted in printing)	40	—
Order requiring plaintiff to give bond (omitted in printing)	41	—
Order releasing Michael Lewis from custody (omitted in printing)	41	—
Order sustaining demurrer to plea (omitted in printing)	41	—
Order granting leave to file additional pleas	42	14
Order granting leave to withdraw demurrer, &c. (omitted in printing)	42	—
Order beginning trial (omitted in printing)	43	—
Orders continuing trial (" ")	43	—
Orders continuing trial (" ")	44	—
Order concluding trial (" ")	44	—
Order overruling motion for new trial	45	14
Order extending time to file bond, &c.	45	14
Order as to substitute pleas (omitted in printing)	46	—
Stipulation as to use of original bill of exceptions (omitted in printing)	46	—
Bill of exceptions (omitted in printing)	47	—
Motion to quash writ of attachment (" ")	48	—
Affidavit of Dora Marks (" ")	49	—
Affidavit of Louis H. Jacobs (" ")	52	—
Testimony of Dora Marks (omitted in printing here; see side pages 357–361 and 370)	54	—
Plaintiff's Exhibit 1—Articles of Association of the Chicago Furniture and Lumber Company (omitted in printing)	67	—
2—Certificate of deposit (omitted in printing)	70	—
3—Guarantee of June 17, 1893 (omitted in printing)	75	—
4—Monthly statement, Nov. 1, 1893, (omitted in printing)	76	—
6—Letter of Mrs. Marks (omitted in printing)	79	—
7—Certificate of stock—Mrs. Marks	81	15
Certificate of stock—Neufeld	81	15
Testimony of Isaac Cohn (omitted in printing)	123	—
Dora Marks (resumed) (omitted in printing here)	126	—
Charles M. Miller (omitted in printing)	138	—
Plaintiff's Exhibit 8—Contract (" ")	139	—
Testimony of Nathan Neufeld (omitted in printing here; see side page 361)	144	—
Testimony of J. L. Price (omitted in printing)	147	—
Plaintiff's Exhibit 8*a*—Statement as to lots, &c. (omitted in printing)	148	—

	Original.	Print
Testimony of C. L. Mahoney.....(omitted in printing)..	151	—
Dora Marks (recalled) (omitted in printing) here)	154	—
George C. Higbee....(omitted in printing)..	162	—
Defendant's Exhibit 1—Agreement of June 8, 1893, (omitted in printing).....	163	—
2—Agreement of August 22, 1893, (omitted in printing).....	164	—
3—Record in case of Marks *vs.* Chicago Furniture and Lumber Co. (part omitted in printing).....	166	16
Defendant's Exhibits 4 to 13—Letters (omitted in printing).....	192	—
Testimony of George Gallup .. ..(omitted in printing)..	198	—
Henry L. Tolman ..(" ")..	213	—
Nathan Neufeld.....(" ")..	216	—
Exhibit 14—Receipt, April 11, 1894 (omitted in printing)	233	—
10—Agreement, May 25, 1893 (omitted in printing)	236	—
Testimony of Louis Jacobs..... (omitted in printing)..	240	—
Plaintiff's Exhibit 9—Account (" ")..	282	—
10—Letter, Jacobs to Cohn, July 20, 1893 (omitted in printing).	292	—
Testimony of Marshall D. Ewell...(" ")..	299	—
Dora Marks (recalled) (omitted in printing)..	303	—
Plaintiff's Exhibit 11—Agreement of July 14, 1894 . .	306	26
Instructions for plaintiff	311	27
Instructions for defendant.....	313	28
Instructions asked by defendant ....(omitted in printing)..	317	—
Verdict..... (" ")..	318	—
Motion for new trial.....	319	29
Judge's certificate to bill of exceptions (omitted in printing here).....	321	—
Appeal bond	321	30
Clerk's certificate.....	322	31
Transcript from appellate court	323	31
Assignment of errors	323	31
Order taking cause under advisement.....	326	33
Judgment.....	327	33
Order on motion to amend judgment.....	327	34
Order granting rehearing and setting aside judgment.....	328	34
Judgment.....	328	34
Order allowing appeal.....	329	35
Clerk's certificate.....	330	35
Assignment of errors	330	35
Notice to non-resident.....	334	38
Appearance for defendant in error.....	335	38
Order denying leave to file abstract.....	336	39
Order taking cause under advisement.....	336	39
Judgment	337	39

	Original.	Print
Opinion	339	40
Assignment of error	343	42
Petition for writ of error	346	44
Writ of error	348	46
Bond	349	47
Citation and service	350	47
Clerk's certificate	352	49
Statement of errors and designation of parts of record to be printed	353	50
Notice to clerk	353	50
Statement of errors	354	50
Designation by plaintiff in error of parts of record to be printed	356	52
Testimony of Dora Marks	357	53
Nathan Neufeld	361	57
Mrs. Marks (recalled)	361	57
Louis Jacobs	362	58
Instructions asked by defendant	364	60
Notice to defendant in error	367	62
Notice to defendant in error	368	62
Notice to clerk by defendant in error	369	63
Additional parts designated by defendant in error	370	63
Testimony of Dora Marks	370	63
Notice to plaintiff in error	374	67

1 At a supreme court begun and held at Springfield, on Tuesday, the fifth day of June, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: James H. Cartwright, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; Joseph N. Carter, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the 18th day of August, A. D. 1899, there was filed in the office of the clerk of said court a certain transcript of record of the circuit court of Cook county and of the appellate court of first district, together with an affidavit; which said affidavit and transcripts are in the words and figures following, viz:

* * * * * * * *

2 And thereupon there issued a certain *scire facias* and notice to non-resident defendants in error; which said *scire facias* with return and notice are in the words and figures following, viz:

STATE OF ILLINOIS, } ss:
Supreme Court, }

The People of the State of Illinois to the sheriff of Cook county, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the appellate court of Illinois, first district, before the judge thereof, between Louis Jacobs and Dora Marks, it is said manifest error hath intervened, to the injury of the said Louis Jacobs, as we are informed by his complaint, the records and proceedings of which said judgment we have caused to be brought into our supreme court of the State of Illinois, at
3 Springfield, before the justices thereof, to correct the errors in the same in due form and manner according to law:

Therefore we command you that by good and lawful men of your county you give notice to the said Dora Marks that she be and appear before the justices of our said supreme court, at the next term of said court, to be holden at Springfield, in said State, on the first Tuesday in October, A. D. 1899, to hear the record and proceedings aforesaid and the errors assigned, if she shall see fit, and further to do and receive what said court shall order in this behalf; and have you then and there the names of those by whom you shall give the said Dora Marks notice, together with this writ.

Witness James H. Cartwright, chief justice of our said court, and the seal thereof, at Springfield, this eighteenth day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[SEAL.]

P'd 10.

1—410

The within-named defendant not found in my county this 3d day of October, 1899.

ERNEST J. MAGERSTADT, *Sheriff*,
By WILLIAM BUSSE, *Deputy*.

Blum & Blum, 87 Washington St., room 508.

STATE OF ILLINOIS:

Supreme Court.

LOUIS JACOBS } *vs.* DORA MARKS. } Error to Appellate Court of Illinois, First District.

Whereas the said Louis Jacobs has sued out a writ of error from said supreme court to reverse a judgment obtained by said
4 Dora Marks against said Louis Jacobs in the said appellate court of Illinois, first district, which said writ of error is now pending in said supreme court; and whereas a writ of *scire facias* has been duly issued herein, returnable on the first day of the next term of said supreme court, to be holden at Springfield, in said State, on the first Tuesday in October next, according to law; and whereas also it appears by affidavit on file in the clerk's office of said supreme court that the said Dora Marks is a non-resident of the State of Illinois and without the reach of the process of said supreme court:

Now, therefore, you, the said Dora Marks, the said defendant in error, whose non-residence appears as aforesaid, are hereby notified to be and appear before the justices of said supreme court, at the next term of said court, to be holden at Springfield, in said State, on the first Tuesday in October next, to hear the record and proceedings brought into said supreme court on return of said writ of error and the errors assigned, if you shall see fit, and further to do and receive what said court shall order in this behalf.

Dated this 18th day of August, A. D. 1899.

CHRISTOPHER MAMER, *Clerk*.

BLUM & BLUM, *Attorneys*. 19–26–2–9.

5 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } *Cook County*, } *ss*:

Pleas before the Honorable R. W. Clifford, one of the judges of the circuit court of Cook county, at a term thereof begun and held in the court-house, at Chicago, in said county and State, on the third Monday, being the fifteenth day, of November, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-second.

Present: Honorable R. W. Clifford, one of the judges of the circuit court of Cook county, State of Illinois; Charles S. Deneen, State's attorney; James Pease, sheriff.

Attest: JOHN A. COOKE, *Clerk*.

Be it remembered that heretofore, to wit, on the 4th day of June, A. D. 1896, a certain people's writ of summons issued out of the office of the clerk of said court and under the seal thereof, directed to the sheriff of Cook county to execute; which said writ together with the return of the sheriff thereon endorsed are in words and figures following, to wit:

6-9 STATE OF ILLINOIS, } ss.:
Cook County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Louis Jacobs, if he shall be found in your county, personally to be and to appear before the circuit court of Cook county on the first day of the term thereof, to be holden at the court-house, in the city of Chicago, in said Cook county, on the third Monday of June, 1896, to answer unto Cora Marks in a plea of trespass on the case, to the damage of said plaintiff, as it is said, in the sum of four thousand dollars.

And have you then and there this writ, with an indorsement thereon in what manner you shall have executed the same.

Witness Frank J. Gaulter, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 4th day of June, A. D. 1896.

FRANK J. GAULTER, *Clerk.*

P'd 78.

Served this writ on the within-named defendant, Louis Jacobs, by reading to him, this 9th day of June, 1896.

JAMES PEASE, *Sheriff,*
By D. W. NICKERSON, *Deputy.*

* * * * * * *

10 STATE OF ILLINOIS, } ss.:
County of Cook, }

In the Circuit Court of Cook County.

DORA MARKS }
vs.
LOUIS JACOBS. }

Dora Marks, by John W. Byam and Charles L. Mahoney, her attorneys, complains of Louis Jacobs, defendant, of a plea of trespass on the case.

For that whereas, before and at the time of committing of
11 the grievances by the defendant, as hereinafter mentioned, the defendant was engaged in business in Chicago, Cook county, Illinois.

And plaintiff avers that the defendant desired to join with one Nathan Neufeldt in the business of the manufacture and sale of furniture at, to wit, the town of Escanaba, in the State of Michigan, and to incorporate a company for the purpose of carrying on said last enterprise.

And plaintiff further avers that the defendant was a man of small means and was required by said Nathan Neufeldt to furnish more money to the enterprise than the defendant had, and for that purpose was required by the said Neufeldt to induce some third person to put money into the said enterprise who would agree to become one of the corporation for the purpose of carrying on the said scheme of manufacturing and selling furniture.

And plaintiff further avers that the defendant, being anxious to join the said Neufeldt in said scheme or enterprise and being further desirous to induce the plaintiff to join with him and said Neufeld in said scheme for incorporation and the enterprise of sale and manufacture of furniture at, to wit, Escanaba, in the State of Michigan, heretofore, to wit, at Chicago, Cook county, Illinois, on or about the 15th day of June, A. D. 1893, wrongfully and injuriously contriving and intending to deceive, defraud, and ignore the plaintiff in this behalf, falsely, fraudulently, and deceitfully represented and asserted to the plaintiff that said Nathan Neufeldt was a man of large wealth and means, the owner of the house he lived in at Chicago, which said defendant averred was worth twenty thousand dollars, and the owner of a factory at Chicago, which said defendant averred was worth sixty thousand dollars ($60,000); that said Neufeldt would contribute twenty-five thousand dollars ($25,000) in cash as his share of the money to be put into said corporation
12 at its beginning, and that he, defendant, would pay into the said corporation the sum of twelve thousand five hundred dollars ($12,500.00); and thereupon heretofore, to wit, on the day and year last aforesaid, the plaintiff, confiding in the said representations and assertions of the defendant, at the request of the defendants, agreed to pay to said defendant the sum of five thousand dollars ($5,000), to be applied about the business of the corporation to be formed of the plaintiff and defendant and Nathan Neufeldt for the purpose of manufacture and sale of furniture at Escanaba, Michigan.

And the defendant, by them falsely, fraudulently, and deceitfully pretending and representing to the plaintiff that the said false, fraudulent, and deceitful representations of the defendant were true, caused the plaintiff, on the day and year aforesaid, to pay to the defendant the said sum of five thousand dollars ($5,000) for the purpose of becoming a member of the corporation to be formed of the plaintiff and defendant and one Neufeldt for the manufacture and sale of furniture at Escanaba, in the State of Michigan, whereas, in truth and in fact, the said Neufeldt did not own the said house he lived in nor a factory at Chicago worth twenty thousand dollars ($20,000) and sixty thousand dollars respectively ($60,000), nor did he own any real estate, house, or factory, nor did the said Neufeldt promise or intend to pay to the said corporation and enterprise the sum of twenty-five thousand dollars ($25,000) in cash, nor did the defendant intend to put into the said corporation and enterprise twelve thousand five hundred dollars ($12,5000) in cash, as the defendant at the time of his making his said false and deceitful representations well knew; and the plaintiff further saith that the de-

fendant, by means of the promises on the day and year aforesaid
falsely and fraudulently deceived the plaintiff and induced
13 & 14 her to become a member of the corporation formed of the
plaintiff and defendant and said Neufeldt and known as
the Chicago Furniture Company of Escanaba, Michigan, and to take
shares in the same, and thereby the said shares of stock in the said
corporation have become and are of no use or value to the plaintiff,
and so the defendant falsely deceived and defrauded the plaintiff, to
her damage of ten thousand dollars ($10,000), and therefore she
brings this suit, etc.

JOHN A. BYAM AND
C. L. MAHONEY,
Att'ys for Plaintiff.

15 * * * * * * *

And afterwards, to wit, on the 16th day of June, A. D. 1896, a certain appearance and a certain demurrer *was* filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

DORA MARKS }
vs.
LOUIS JACOBS. }

16–23 We hereby enter our appearance as attorneys for the defendant, Louis Jacobs.

BLUM & BLUM.

* * * * * * *

24 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook Co., Ill.

DORA MARKS }
vs. } Gen. No., 157,718; Term No., 11579.
LOUIS JACOBS. }

And now comes the plaintiff, and as to the plea of the defendant by him first above pleaded to the affidavit for attachment and whereof he has put himself upon the country doth the like.

CHARLES L. MAHONEY,
JOHN W. BYAM,
Att'ys for Plaintiff.

STATE OF ILLINOIS, } ss:
County of Cook, }

In Circuit Court of Cook Co.

DORA MARKS }
vs. } 157,718, 11579.
LOUIS JACOBS. }

And now comes the plaintiff, and as to the plea of the defendant first above pleaded and whereof he has put himself upon the country doth the like.

CHARLES L. MAHONEY,
JOHN W. BYAM,
Att'y- for Pl'ffs.

25 And afterwards, to wit, on the 23rd day of April, A. D. 1897, a certain additional plea was filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

DORA MARKS }
vs. }
LOUIS H. JACOBS. }

And for a further plea in this behalf the defendant says that the plaintiff ought not to have her aforesaid action against him, the defendant, because he says that after the making of the said alleged false representations by the defendant and after the plaintiff had parted with said sum of four thousand dollars on the strength thereof, as set out in the declaration, the plaintiff on or about the 4th day of December, 1893, instituted an action in the circuit court of the State of Michigan in and for the county of Delta against the Chicago Furniture & Lumber Company, a corporation, to recover the said sum of four thousand dollars: that in said cause said Dora Marks was the plaintiff and The Chicago Furniture and Lumber Company, a corporation, was the defendant, and that afterwards service was duly had upon the said corporation, and the said corporation entered its appearance in said cause and the said circuit court of Delta county, Michigan, acquired jurisdiction of the parties to said cause and of the subject-matter thereof; that afterwards the said plaintiff and the said defendant came to a settlement of the said cause of action, and at a general term of the said circuit court for the county of Delta, and held at the court-house, in the city
26 of Escanaba, in said county, on July 25th, 1894, the court entered an order in said cause; which order is as follows:

"This cause having been settled, it is hereby discontinued by consent of both parties without cost to either party;" which said order was duly entered in said court by the Honorable John W. Stone,

circuit judge of said court; all of which will more fully appear by the record of said court of said cause; that the said cause of action set forth in the declaration in this cause is brought upon the same claim upon which the said action was brought by the said Dora Marks against the said Chicago Furniture & Lumber Company, as in this plea stated, to wit, to recover the said four thousand dollars paid by her on her subscription, as set out in the declaration, and not for a different or other cause of action, and so the defendant says the plaintiff has received satisfaction and payment of her said claim; and this the defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have her aforesaid action against him, etc.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have her aforesaid action against him, the defendant, because he says that after the occurrence of the grievances in said declaration mentioned and after the plaintiff had subscribed for said stock, as set forth in the declaration, and paid the sum of four thousand dollars, to wit, on or about the 4th day of December, 1893, the said plaintiff commenced an action against the Chicago Furniture & Lumber Company, a corporation, in the circuit court of Michigan in and for Delta county, which was then and ever since has been a court of record in and for the State of Michigan, to recover the sum of four thousand dollars from the said Chicago Furniture & Lumber Company; that on said 4th day of December, 1893,
27 the said Dora Marks, plaintiff in said action, filed in said court an affidavit which is in words and figures as follows:

STATE OF MICHIGAN, } ss:
County of Delta, }

Dora Marks, of the city of Denver, in the State of Colorado, being duly sworn, deposes and says that she is the plaintiff named in the annexed writ of attachment; that The Chicago Furniture & Lumber Company, a corporation organized and doing business under the laws of Michigan, the defendant named in said writ, is justly indebted to her in the sum of four thousand dollars, as near as may be, over and above all legal set-off, and that the same is now due and *upon.*

And the deponent further says that she has good reason to believe that the said Chicago Furniture & Lumber Company fraudulently contracted the debt and incurred the obligation respecting which this suit is brought.

DORA MARKS.

Sworn to and subscribed before me this 4th day of December, A. D. 1893.

HARRY H. ALLYN,
Notary Public in and for Delta County, Michigan.

That afterwards a writ of attachment was issued out of said court in said cause and a large amount of property of said defendant corporation attached; that service was duly had upon said corporation and it entered its appearance in said cause, and said circuit court of

Delta county acquired jurisdiction of said parties and the subject-matter of said suit, and thereafter, at a general term of the said circuit court of the county of Delta, commenced and held at
28 the court-house, in the city of Escanaba, in said county *in said county* of Delta and State of Michigan, on July 25th, 1894, before the Honorable John W. Stone, judge of said court, the following order was entered in said cause, to wit:

"This cause having been settled, it is hereby discontinued by consent of both parties without cost to either party."

That this suit is based upon the same claim on which the said suit of Dora Marks *vs.* The Chicago Furniture & Lumber Company was brought, and that the said settlement was a settlement of the same claim on which this suit is based, and the said plaintiff has had full satisfaction and payment of her said claim; and this the defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have her aforesaid action against him, etc.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have her aforesaid action against him, the defendant, because he says that after the making of the said alleged false representations set forth in the declaration in this cause, to wit, on or about the 4th day of December, 1893, and after the plaintiff had subscribed for the said stock and paid for the same, as set forth in said declaration, the plaintiff, in order to recover the said sum of four thousand dollars which she had paid on said subscription, instituted, as plaintiff, in the circuit court of the State of Michigan in and for the county of Delta, an action entitled Dora Marks *vs.* The Chicago Furniture & Lumber Company, and on said 4th day of December, 1893, she filed in said court, which was at said time a court of record and has ever since continued to be a court of record, an affidavit subscribed and sworn to by her; which affidavit is as follows:

STATE OF MICHIGAN, }
County of Delta, } *ss:*

29 Dora Marks, of the city of Denver, in the State of Colorado, being duly sworn, deposes and says that she is the plaintiff named in the annexed writ of attachment; that The Chicago Furniture & Lumber Company, a corporation organized and doing business under the laws of Michigan, the defendant named in said writ, is justly indebted to her in the sum of four thousand dollars, as near as may be, over and above all legal set-off, and that the same is now due and *upon.*

And this deponent further says that she has good reason to believe that the said Chicago Furniture & Lumber Company fraudulently contracted the debt and incurred the obligation respecting which this suit is brought.

DORA MARKS.

Sworn and subscribed before me this 4th day of December, A. D. 1893.

HARRY H. ALLYN,
Notary Public in and for Delta County, Michigan.

That thereupon there issued a certain writ of attachment out of said circuit court in and for Delta county, Michigan, in the name of the people of the State of Michigan, directed to the sheriff of said county of Delta, commanding him that he attach so much of the lands, tenements, goods, chattels, moneys, and effects of the defendant, The Chicago Furniture & Lumber Company, a corporation organized and doing business under the laws of Michigan, not exempt from execution, wheresoever the same may be found within the said county of Delta, as will be sufficient to satisfy the demand of Dora Marks and costs of suit, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff in said attachment, and that he summon the defendant to be and appear before the said circuit court, at the court-house, in the city of Escanaba, on Tuesday, the 2d day of January, 1894, at ten o'clock in the forenoon of said day, to answer
30 the plaintiff and to make due return of this writ, which said writ of attachment was signed under the hand of the clerk of said court, with the seal thereof attached, and was duly delivered to the then sheriff of said county of Delta, who made a return on said writ that he had duly levied upon the goods and chattels of said defendant, and that he had served the said writ upon the president of the said corporation; that by virtue of and under said writ the sheriff had seized a large amount of property of the said corporation, being of the value of upwards of the sum of eight thousand dollars; that thereafter said defendant corporation entered its appearance in said cause, and the said circuit court of Delta county, Michigan, acquired jurisdiction of the parties thereto and the subject-matter thereof; that afterwards, to wit, on the 18th day of December, 1893, a motion to dissolve said attachment came up before said court and the motion was granted and the attachment dissolved; that thereupon the said corporation threatened, by its president, and was about to institute an action for damages against the said Dora Marks for the wrongful issuing out of said attachment, and that thereupon the said Dora Marks and the said Chicago Furniture & Lumber Company came to an agreement and settlement of said causes of action between them, and it was thereby agreed by and between the said corporation and the said Dora Marks that the said corporation should forego its right to commence an action for damages against the said Dora Marks on account of the suing out of the said writ of attachment, and in consideration thereof that the said Dora Marks should dismiss her said action, to wit, the said suit in attachment, against the Chicago Furniture & Lumber Company; that, in compliance with the terms of said agreement, the said circuit court of Delta county, State of Michigan, on the 25th day of July, 1894, entered an order in said cause in the words as fol-
31 lows:

"This cause having been settled, it is hereby discontinued by consent of both parties without cost to either party;" all of which proceedings and judgment will more fully appear by the records of said cause remaining in said circuit court of Delta county.

That said cause of action so commenced in the circuit court of Delta county, Michigan, was based upon the same claim on which

present suit is based, to wit, to *receive* the four thousand dollars paid by her on her stock subscription, as set out in the declaration, and said settlement of said suit against said corporation was a settlement of the same claim on which the present suit is based, and so the defendant says that the said plaintiff has received satisfaction and payment of her said claim; and this the defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have her aforesaid action against him, etc.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have her aforesaid action against him, the defendant, because he says:

That after the making of the said alleged false representations set forth in the declaration in this cause, to wit, on or about the 4th day of December, 1893, and after the plaintiff had subscribed for the said stock and paid for the said *stock, as set forth* in said declaration, the plaintiff, in order to recover the said sum of four thousand dollars which she had paid on said subscription, instituted, as plaintiff, in the circuit court of the State of Michigan in and for the county of Delta, an action entitled Dora Marks *vs.* The Chicago Furniture & Lumber Company, and on said 4th day of December, 1893, she filed in said court, which was at said time a court of record and has ever since continued to be a court of record, an affidavit
32 subscribed and sworn to by her; which affidavit is as follows:

STATE OF MICHIGAN, }
County of Delta, } *ss:*

Dora Marks, of the city of Denver, in the State of Colorado, being duly sworn, deposes and says that she is the plaintiff named in the annexed writ of attachment; that The Chicago Furniture & Lumber Company, a corporation organized and doing business under the laws of Michigan, the defendant named in said writ, is justly indebted to her in the sum of four thousand dollars, as near as may be, over and above all legal set-off, and that the same is now due and *upon.*

And the deponent further says that she has good reason to believe that the said Chicago Furniture & Lumber Company fraudulently contracted the debt and incurred the obligation respecting which the suit is brought.

DORA MARKS.

Sworn to and subscribed before me this 4th day of December, A. D. 1893.

HARRY H. ALLYN,
Notary Public in and for Delta County, Michigan.

That thereupon there issued a certain writ of attachment out of said circuit court in and for Delta county, Michigan, in the name of the people of the State of Illinois, directed to the sheriff of said county of Delta, commanding him that he attach so much of the lands, tenements, goods, chattels, moneys, and effects of the said

defendant, The Chicago Furniture & Lumber Company, a corporation organized and doing business under the laws of Michigan, not exempt from execution, wheresoever the same may be found within the said county of Delta, as will be sufficient to satisfy the demand of Dora Marks and costs of suit, and safely keep the same to
33 satisfy any judgment that may be recovered by the plaintiff in said attachment, and that he summon the defendant to be and appear before the said circuit court, at the court-house, in the city of Escanaba, on Tuesday, the 2d day of January, A. D. 1894, at ten o'clock in the forenoon of said day, to answer the plaintiff and to make due return of this writ; which said writ of attachment was signed under the hand of the clerk of said court, with the seal thereof attached, and was duly delivered to the then sheriff of said county of Delta, who made a return on said writ that he had duly levied upon the goods and chattels of said defendant, and that he had served the said writ upon the president of said corporation; that by virtue of and under said writ the said sheriff had seized a large amount of property of the said corporation of the value of upwards of the sum of eight thousand dollars; that service was duly had upon said corporation and it entered its appearance in said cause, and the said circuit court of Delta county, Michigan, acquired jurisdiction of the parties thereto and the subject-matter thereof; that afterwards, to wit, on the 18th day of December, 1893, a motion to dissolve said attachment came up before said court and the motion was granted and the said attachment dissolved; that thereupon the said corporation intended to and was about to institute an action for damages against the said Dora Marks for the wrongful issuing out of said attachment, and that thereupon the said Dora Marks and the said Chicago Furniture & Lumber Company came to an agreement and settlement of said causes of action between them, and it was thereby agreed by and between the said corporation and the said Dora Marks that the said corporation should forego its right to commence an action for damages against the said Dora Marks on account of the suing out of the said writ of attachment, and in consid-
34 eration thereof that the said Dora Marks should dismiss her said action.

That this defendant was at said time and until the entry of the order hereinafter mentioned a stockholder in said corporation and the holder and owner of twenty-five per cent. of its capital stock.

That in compliance with the terms of the said agreement *in* the said circuit court of Delta county, State of Michigan, on the 25th day of July, 1894, entered an order in said cause in the words as follows:

"This cause having been settled, it is hereby discontinued by consent of both parties without cost to either party;" which order or judgment will more fully appear from the records of said cause remaining in said circuit court of Delta county; that said cause of action so commenced in the circuit court of Delta county, Michigan, was based upon the same claim on which the present suit is based, to wit, to recover the four thousand dollars paid by her on her stock subscription, as set forth in the declaration, and said settle-

ment of said suit against said corporation was a settlement of the same claim on which the present suit is based.

And so the defendant says that the said plaintiff has received satisfaction and payment of her said claim; and this the defendant is rea-y to verify. Wherefore he prays judgment if the plaintiff ought to have her aforesaid action against him, etc.

BLUM & BLUM,
Attorneys for Defendant.

* * * * * * *

35 And afterwards, to wit, on the 28th day of June, A. D. 1897,
36 a certain replication to additional pleas was filed in the office of the clerk of said court in words and figures following, to wit:

STATE OF ILLINOIS, }
County of Cook, } *ss:*

In the Circuit Court of Cook County.

DORA MARKS }
vs. } Gen'l No., 157,718; term No., 11579.
LOUIS JACOBS. }

And the plaintiff, as to the pleas of the defendant by him secondly, thirdly, fourthly, and fifthly above pleaded, says that she, the plaintiff, by reason of anything in those pleas alleged, ought not to be barred of her aforesaid action, because she says that the said cause of action set forth in the declaration herein is not the same claim as that sued on by the plaintiff herein in the suit of Dora Marks *vs.* The Chicago Furniture & Lumber Company, in the circuit court of Delta county, Michigan, as alleged in the aforesaid pleas, and that she, the plaintiff, did not nor has she at any time received satisfaction of her said claim sued on herein, as above alleged in the aforesaid pleas; and this the plaintiff prays may be inquired of by the country, etc.

CHARLES L. MAHONEY AND
JOHN W. BYAM,
Attorneys for Plaintiff.

* * * * * * *

37 And afterwards, to wit, on the 8th day of February, A. D. 1898, a certain plea was filed in the office of the clerk of said court *nunc pro tunc* as of August 24th, A. D. 1896, in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

DORA MARKS }
vs.
LOUIS JACOBS. }

And the defendant, by Blum & Blum, his attorneys, comes and defends the wrong and injury when, etc., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against him; and of this the defendant puts himself upon the country, etc.

BLUM & BLUM,
Attorneys for Defendant.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have her aforesaid action against him, the defendant, because he says that there is no cause of action set
38 out in the said declaration, and the matters and things therein set forth do not constitute a cause of action; and of this the defendant puts himself upon the country, etc.

BLUM & BLUM,
Attorneys for Defendant.

Be it remembered that heretofore, to wit, on the 21st day of July, A. D. 1897, a certain verdict was filed in the office of the clerk of said court in words and figures following, to wit:

We, the jury, find the attachment issue in favor of plaintiff.

We, the jury, find the defendant guilty and assess the plaintiff's damages at four thousand dollars ($4,000).

CHARLES J. STANG, *Foreman.*
JOHN PEARSON.
R. C. HILL.
PETER PRINCE.
JOHN YUNKER.
JOHN JOHNSTON.
V. A. FLORUNCE.
J. L. MUNSON.
THOMAS POWELL.
JOHN GRAY.
JOHN R. STOCKWELL.
BOB JUNDRICH.

And afterwards, to wit, on the 29th day of November, A. D. 1897, the following proceedings were had and entered of record in said court, to wit:

* * * * * * *

39–41 Thereupon, on motion of plaintiff's attorney, it is ordered that final judgment be, and the same is hereby, entered

herein, according to the verdict heretofore rendered herein by the jury aforesaid.

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant, Louis Jacobs, her said damages of four thousand dollars ($4,000.00), in form, as aforesaid, by the jury assessed, together with the costs and charges in this behalf expended, and have execution therefore, as well as execution against the property attached herein by virtue of the writ of attachment issued in said cause. Thereupon the defendant, having entered his exceptions herein, prays an appeal from the judgment of this court to the appellate court in and for the first district of Illinois, which is allowed upon said defendant filing herein his appeal bond in the penal sum of two thousand dollars, to be approved by the court, within twenty days from this date, and his bill of exceptions within thirty days from this date.

* * * * * * *

42–44 And afterwards, to wit, on the 23rd day of April, A. D. 1897, the following proceedings were had and entered of record in said court, to wit:

DORA MARKS
vs.
LOUIS JACOBS. } 157,718.

On motion of defendant's attorney, it is ordered that leave be, and the same is hereby, given defendant to file additional pleas instanter to the plaintiff's declaration filed in said court.

* * * * * * *

45–80 And afterwards, to wit, on the 18th day of November, A. D. 1897, the following proceedings were had and entered of record in said court, to wit:

DORA MARKS
vs.
LOUIS JACOBS. } 157,718 Case.

This cause coming on to be heard upon defendant's motion heretofore entered herein for a new trial in said cause and both issues, after arguments of counsel and due deliberation by the court, said motion is overruled and a new trial denied; whereupon the defendant enters herein her motion in arrest of judgment; which motion is also overruled and denied.

And afterwards, to wit, on the 18th day of December, A. D. 1897, the following proceedings were had and entered of record in said court, to wit:

DORA MARKS
vs.
LOUIS JACOBS. } 157,718 Case.

On motion of defendant's attorney, it is ordered that the appeal bond be, and the same is, reduced to two hundred and fifty dollars;

and, on like motion, it is ordered that the time to file bond and bill of exceptions be, and the same is hereby, extended sixty days and execution stayed until the further order of this court.

* * * * * * *

81 PL'T'F'S EX. 7.

Incorporated under the laws of the State of Michigan.

No. 11. 500 shares.

The Chicago Furniture & Lumber Company, Escanaba, Michigan.

Capital stock, $200,000. Shares, $10.00 each.

This certifies that Dora Marks is the owner of five hundred shares of the capital stock of the Chicago Furniture & Lumber Company, full paid and non-assessable, transferrable only on the books of the corporation in person or by attorney on surrender of this certificate.

In witness whereof the duly authorized officers of this corporation have hereunto subscribed their names and caused the corporate seal to be hereto affixed, at Escanaba, this 29th day of July, A. D. 1893.

L. H. JACOBS, *Secretary.*
NATHAN NEUFELD, *President.*

{ Seal of the Chicago Furniture & Lumber Company, Escanaba, Mich. }

PLAINTIFF'S EX. 7.

Incorporated under the laws of the State of Michigan.

No. 9. 1,500 shares.

The Chicago Furniture & Lumber Company, Escanaba, Michigan.

Capital stock, $200,000. Shares, $10.00 each.

This certifies that Nathan Neufeld is the owner of fifteen hundred shares of the capital stock of the Chicago Furniture
82–165 & Lumber Company, full paid and non-assessable, transferrable only on the books of the corporation in person or by attorney on surrender of this certificate.

In witness whereof the duly authorized officers of this corporation have hereunto subscribed their names and caused the corporate seal to be hereto affixed, at Escanaba, this 29th day of July, A. D. 1893.

L. H. JACOBS, *Secretary.*
NATHAN NEUFELD, *President.*

{ Seal of the Chicago Furniture & Lumber Company, Escanaba, Mich. }

(Endorsed:) For value received I hereby sell, transfer, and assign to Dora Marks the shares of stock within mentioned, and hereby authorize L. H. Jacobs, sec'y, to make the necessary transfer on the books of the corporation.

Witness my hand and seal this 29th day of July, 1893.

NATHAN NEUFELD.

Witnessed by—
L. H. JACOBS.

* * * * * * *

166 Mr. BLUM: I also introduce certified copy of record of proceedings in the circuit court of Delta county, Michigan, in the case of Dora Marks *vs.* The Chicago Furniture and Lumber Company, and ask that the same be marked Defendant's Exhibit "3." It is as follows:

STATE OF MICHIGAN, }
County of Delta, } ss:

The People of the State of Michigan to all to whom these presents shall come, Greeting:

Know ye that we, having inspected the files of the circuit court of Delta county, State of Michigan, find there remain- on file a certain judgment-roll in a certain action of attachment wherein Dora Marks is plaintiff and The Chicago Furniture & Lumber Company is defendant; that said cause was commenced in said court on the 4th day of December, 1893.

Present: The Honorable John W. Stone, sole and presiding circuit judge.

IRA C. JENNINGS,
Prosecuting Attorney for Delta County.
REGUS BEAUCHAMP,
Sheriff of Delta County.

Attest: OSCAR V. LINDEN, *Clerk.*

Be it remembered that heretofore, to wit, on the 4th day of December, 1893, the following affidavit was filed in said court:

[Seal of the Circuit Court of Delta County, Michigan.]

167 STATE OF MICHIGAN, }
County of Delta, } ss:

Dora Marks, of the city of Denver, State of Colorado, being duly sworn, deposes and says that she is the plaintiff named in the annexed writ of attachment; that The Chicago Furniture and Lumber Company, a corporation organized and doing business under the laws of Michigan, the defendant named in the said writ, is justly indebted to her in the sum of four thousand dollars, as near as may be, over and above all legal set-off, and that the same is now due and *upon.*

And this deponent further says that he has good reason to believe that the said Chicago Furniture and Lumber Company fraudulently

contracted the debt and incurred the obligation respecting which this suit is brought.

DORA MARKS.

Sworn to and subscribed before me this 4th day of December, 1893.

HARRY H. ALLYN,
Notary Public in and for Delta County, Mich.

That afterwards, to wit, on the same day, a writ of attachment issued out of said court, which is as follows:

STATE OF MICHIGAN, } ss:
County of Delta, }

The Circuit Court for the County of Delta.

In the name of the people of the State of Michigan, to the sheriff of the county of Delta, Greeting:

[Seal of the Circuit Court, Delta County, Michigan.]

You are commanded to attach so much of the lands, tene-
168 ments, goods, chattels, moneys, and effects of the defendant, The Chicago Furniture & Lumber Company, a corporation organized and doing business under the laws of Michigan, not exempt from execution, wherever the same may be found within the county of Delta, as will be sufficient to satisfy the demands of Dora Marks, plaintiff, and costs of suit, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff in this attachment.

And in case you shall seize any property of said defendant in said county, but not sufficient to satisfy said demand and costs, then you are hereby further commanded to seize other property of said defendant subject to attachment sufficient, with that seized in said county of Delta, to satisfy said demand and costs, wherever the same may be found in the State of Michigan.

You are also commanded to summon the defendant, if he be found within said county of Delta or in any other county of the State of Michigan where you may have seized property under and by virtue of this writ, to appear before the circuit court for the county of Delta, at the court-house, in the city of Escanaba, on Tuesday, the 2nd day of January, 1894, at ten o'clock in the forenoon of said day, to answer the plaintiff, and of this writ make due return.

——— ———,
Circuit Judge.

Witness the Honorable John W. Stone, circuit judge, at the city of Escanaba, this 4th day of December, in the year of our Lord one thousand eight hundred and ninety-three.

O. V. LINDEN, *Clerk.*

169 MEAD & JENNINGS,
Att'y for Plaintiff.

That afterwards, on the 18th day of December, 1893, there was filed in said court the petition of the Chicago Furniture & Lumber Company, verified by the affidavit of Nathan Neufeld, which is as follows:

STATE OF MICHIGAN:

The Circuit Court for the County of Delta.

DORA MARKS
vs.
THE CHICAGO FURNITURE AND LUMBER COMPANY.

The petition of The Chicago Furniture & Lumber Company, defendant in the above-entitled cause, respectfully shows that said case was commenced by writ of attachment, issued out of said court, bearing date on the 4th day of December, 1893, directed and delivered to Alex. Roberts, deputy sheriff of said county, and that the said deputy sheriff, by virtue of said writ, on the 4th day of December, 1893, seized and took into his possession and now holds the goods and chattels mentioned in the annexed schedule marked "Exhibit A" and made a part of this petition, which said goods and chattels are the property of this defendant.

Your petitioner further shows that the affidavit annexed to said writ, and upon which the said writ was issued, sets forth that the Chicago Furniture and Lumber Company has fraudulently contracted the debt or incurred the obligation respecting which the suit was brought, and that no other cause for issuing the said attachment was set forth in the said affidavit, and your petitioner denies that it has fraudulently contracted the debt or incurred the obligation respecting which this suit was brought, and it therefore
170–172 prays that the said attachment may be dissolved and that the goods and chattels so seized and taken upon said attachment may be restored to said defendant; and your petitioner further shows that the said defendant is not lawfully entitled to the possession of the said described goods and chattels.

THE CHICAGO FURNITURE & LUMBER CO.,
By N. NEUFELD, *Pres't.*

* * * * * * *

173 That afterwards, to wit, on the 18th day of December, 1893, the following order was entered by said circuit court in said cause by the Hon. John W. Stone, circuit judge of said court; which order is as follows:

STATE OF MICHIGAN:

The Circuit Court for the County of Delta.

DORA MARKS
vs.
THE CHICAGO FURNITURE AND LUMBER COMPANY.

On reading the petition of The Chicago Furniture and Lumber Company, the defendant, duly verified, praying that the attachment

in this cause may be dissolved and the property seized by virtue thereof restored to the said defendant for reasons in said peti-
174 tion set forth, ordered that the said plaintiff be, and is hereby, cited and required to show cause on the 15th day of Dec., instant, at eleven o'clock in the forenoon, before me, at the city of Marquette, Marquette county, why the said attachment should not be dissolved and the property aforesaid restored to the said defendant.

Dated Dec. 8th, 1893.

J. W. STONE,

Circuit Judge for the 25th Circuit of the State of Michigan.

That afterwards, to wit, on the 18th day of December, 1893, the motion to dissolve the attachment in said cause came up before said court and an opinion was filed in said cause as follows:

The Circuit Court for the County of Delta.

DORA MARKS *vs.* THE CHICAGO FURNITURE AND LUMBER Company. } Motion to Dissolve Attachment.

The ground of the attachment in this case was that the defendant fraudulently contracted the debt respecting which the suit was brought. The petition for dissolution of the attachment denies the allegation in the affidavit above stated. Upon the hearing before me the following facts appeared and are found to exist:

The plaintiff, with Nathan Neufeld and Louis H. Jacobs, were the promoters and original stockholders of the defendant corporation. The articles of association were executed June 12, 1893. The capital stock of the corporation was the sum of $200,000. The number of shares were 20,000 of the par value of $10 each. The articles recited that the amount of stock actually paid in at the date thereof
175 was $20,000, being ten per cent of said capital stock. Nathan Neufeld became an original subscriber for 18,250 shares, the plaintiff for 500 shares, and Louis H. Jacobs for 1,250 shares, being the entire amount of stock contemplated by the articles. The object and purpose of the corporation was the manufacture of furniture and lumber, and the operations were to be carried on in the county of Delta.

A few days before the articles were signed the three persons above named, who subsequently became the incorporators, met at the office of George Gallup, Esq., an attorney at Escanaba, and there talked over the scheme. The plaintiff is and then was a widow and not acquainted with or familiar with business of the nature contemplated. She relied largely upon Mr. Jacobs, an old acquaintance and friend, to represent and protect her interests. At this meeting it was agreed that the capital stock of the corporation to be formed should consist of 20,000 shares of $10 each, aggregating $200,000. Mr. Neufeld was at that time the holder of a contract from Frank H. Van Cleave, providing for the transfer to Neufeld or his assigns of the

property known as the Cochrane Roller Mills plant and location upon certain conditions therein stated. Said agreement is made a part of this finding. This contract and the property therein described, together with 40 acres of outlying land which Mr. Neufeld controlled, were to be transferred to defendant company when organized. This plant is located in the city of Escanaba and was visited and examined by the plaintiff at or about this time. Neufeld represented that the said contract and property to be turned over to the corporation were very valuable and worth at least one hundred and twenty-five thousand dollars, whereas in fact it was not worth to exceed twenty-five thousand dollars. It was agreed at this meeting that the contract and property should be turned over to the corporation when formed at the sum of one hundred and fifty-
176 seven thousand five hundred dollars; that Neufeld should pay over to the corporation in cash $25,000, Jacobs, $12,500, and the plaintiff $5,000.00. It was further agreed that the stock issued to Neufeld representing the contract and property to be by him turned over to the corporation should be divided among the incorporators as follows: Plaintiff to have $15,000, additional stock at par; Jacobs, $37,500, to be paid into the treasury $30,000, and Neufeld the remainder. These constituted in substance the representations and terms of the agreement at that time. The plaintiff paid in the $5,000 when the articles were executed.

At the first meeting of the stockholders the plaintiff was not present, but she was elected a director and was so notified. She was later, by the directors, elected a vice-president; Neufeld was elected the president, and Jacobs, secretary and treasurer. The plaintiff attended two or more meetings, but took no active part in the business of the corporation. Neither Neufeld nor Jacobs has paid in the amount of money which they agreed to contribute, and Neufeld has not needed the 40 acres of land. The business has not proved successful. Salaries amounting to $5,000 per annum to Neufeld and $3,500 to Jacobs were agreed upon by the board of directors. Difficulty has arisen in the management of the business which it is not important here to refer to. Before the bringing of this suit on December 4th, 1893, the plaintiff had been re-elected a director and vice-president at the annual meeting on the day held. She declined to act in either capacity—tendered to the president her stock certificates and demanded the repayment of the money paid in by her, less one thousand dollars, which she had loaned from the company.

The testimony before me covered a wide range, but I think that the foregoing are all of the facts necessary to dispose of the case.

To make good the allegation that the debt was fraudulently
177 contracted there must have been on the part of the defendant or of somebody representing and authorized to speak for the defendant a purpose to defraud, and false and fraudulent representations of matters of fact must have been made to the plaintiff. Drake on Attachments, sec. 77.

And false statement by the authorized agents of a corporation in regard to the past or present status of the corporate enterprise or

material matters connected therewith, whereby subscriptions are obtained, is a fraudulent representation.

Cook on Stock, etc., sec. 145.

But it is not every representation that enables a subscriber to set up that he was induced to subscribe by fraud. Thus an honest mistake of judgment as to future business or as to the value of a property or mere matters of opinion as to whether the enterprise will be profitable or successful cannot amount to misrepresentation within the meaning of the law. A misstatement as to the contents of a subscription contract which the subscriber signs is immaterial where he can read but does not.

Cook, sec. 149, and cases cited in notes.

So far we have treated the plaintiff as though she were a mere subscriber of stock in a corporation already formed. But she was more than this. She was one of the promoters of the scheme, and by herself or her friend and agent took part in all the preliminary proceedings. It is true that the property was put in at an overvaluation, but she understood that and took her share of the benefit. Stockholders participating in the issue of paid-up stock upon payment of less than its par value, or who have a knowledge of the act and acquiesce therein, cannot afterwards complain of the transaction, either in their own behalf or in behalf of the corporation. They are bound by estoffel or acquiescence. An issue of stock
178 for property at an overvaluation is distinctly held to be no fraud upon the corporation nor upon the stockholders, all of whom participated.

A participating subscriber cannot withdraw and recover back sums already paid. Such parties are left in the position they have placed themselves. Cook, sec. 39 and 40, and notes. Much less can a director and officer sue the company under such circumstances. There are numerous reasons, it seems to me, why the plaintiff cannot prevail here. When the representations were made the defendant corporation was not yet formed. If there is any liability to the plaintiff it is individual and not corporate liability. It may be said that the corporation received the money and without notice; but it should be borne in mind that the plaintiff was instrumental in giving the corporation life and in launching it in business and in enabling it to obtain credit. She participated in its meetings, it is true, but far enough, it seems to me, to be precluded now, after six months have elapsed, from having the right to rescind her contract relations and maintain this action against the company. The evidence fails to show that there was any such fraud practiced here as the attachment statute contemplates. Upon the facts being denied in the petition for dissolution, the burden is cast upon the plaintiff to make good the cause she alleges by other competent proof, in addition to that contained in her affidavit to the writ. I fail to find such evidence in this case. The parties and the corporation are in an unfortunate condition, but I do not think that it will relieve the difficulty by entertaining proceedings which I am satisfied are not

well grounded. Had the times been more propitious, the business more prosperous, and the corporators more harmonious, I do not think that this plaintiff would be here complaining over her
179 investment. I am satisfied that the plaintiff has not a good and legal cause for suing out the writ of attachment and the same should be dissolved and the property restored to the defendant.

Dated Dec. 16th, 1893.

J. W. STONE,
Circuit Judge.

That afterwards, to wit, on the 18th day of December, 1893, an order was entered by said court before the said judge in said cause; which order is as follows:

The Circuit Court of the County of Delta.

DORA MARKS
vs.
THE CHICAGO FURNITURE AND LUMBER COMPANY.

Application in writing having been made to me by the above-named defendant on the 8th day of December instant for a dissolution of the attachment issued in this cause at the suit of Dora Marks, the above-named plaintiff, and a citation having been issued by me on the same day requiring the plaintiff to show cause before me, at the court-house, in the city of Marquette, on December 15th, 1893, at 11 o'clock a. m., why the said writ of attachment should not be dissolved and the property seized by virtue thereof be restored to the defendant in said attachment, and the said citation having been returned to me, with due proof of the service thereof, and the said parties having appeared before me on the day and year and at the place aforesaid; after hearing the proofs and allegations of the parties and being satisfied that the said plaintiff has not a good and legal cause for suing out such writ, it is therefore ordered that the said attachment be, and the same is hereby, dissolved, and
180–185 that the property seized by virtue thereof be restored to the said Chicago Furniture & Lumber Company, the defendant therein.

Dated December 16th, 1893.

J. W. STONE,
Circuit Judge, 25 Circuit.

That afterwards, to wit, on the 8th day of January, 1894, there was filed in said cause the writ of attachment in said cause, together with the return of the sheriff on said writ, which writ and return heretofore appeared as pages 7 and 8; also the affidavit of the appraisers sworn in by the sheriff to appraise the property seized by him under said writ, and the inventory of appraisal; which documents are as follows:

* * * * * * *

186 That afterwards, to wit, on the 22nd day of January, 1894, there was filed in said cause in this court a declaration which is as follows:

STATE OF MICHIGAN:

In the Circuit Court for the County of Delta.

Dora Marks, plaintiff, hereby, by Mead & Jennings, her attorneys, complains of The Chicago Furniture & Lumber Company, defendant herein, of a plea of trespass on the case upon promises, the said defendant having been duly summoned to answer the said plaintiff.

For that whereas the defendant, on the 4th day of December, A. D. 1893, at the city of Escanaba, in said county of Delta,
187 — indebted to the plaintiff in the sum of seven thousand dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendant at its request.

And in like sum for the price and value of work then and there done and materials for the same provided by the plaintiff for the defendant at its request.

And in a like sum of money then and there lent by the plaintiff to the defendant at its request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant at its request.

And in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them.

And thereupon the said defendant afterwards and on the day and year aforesaid, in consideration of the premises respectively, then and there promised to the plaintiff to pay to her the several sums of money respectively on request; yet the said defendant has regarded its said promises and has not (although often requested so to do) paid any of the said sums of money or any part thereof, to the plaintiff's damage of seven thousand dollars, and therefore she brings suit, etc.

MEAD & JENNINGS,
Plaintiff's Attorneys.

That afterwards, to wit, on the 25th day of January, 1894, there was filed in said court in said cause a plea which is as follows:

STATE OF MICHIGAN:

The Circuit — for the County of Delta.

DORA MARKS
vs.
188 THE CHICAGO FURNITURE AND LUMBER COMPANY.

Now comes the said defendant, by George Gallup, its attorney, and demands a trial of the matters set forth in the declaration of the said plaintiff.

Dated this 24th day of January, A. D. 1894.

GEORGE GALLUP,
Attorney for Defendant.

That afterwards, to wit, on the 25th day of January, 1894, there was filed in said court in said cause a notice which is as follows:

STATE OF MICHIGAN:

The Circuit Court for the County of Delta.

DORA MARKS
vs.
THE CHICAGO FURNITURE & LUMBER COMPANY.

SIR: Please to take notice that the plaintiff in this cause is required to furnish to the defendant's attorney an account, in writing, of the particulars of his demand for which this action is brought.

Dated this 24th day of January, A. D. 1894.

Yours, etc.,

GEORGE GALLUP,
Attorney for Defendant.

To Mead & Jennings, attorneys for plaintiff.

189 That afterwards, to wit, at a general term of the circuit court for the county of Delta, commenced and held at the court-house, in the city of Escanaba, in said county, on Wednesday, July 25th, A. D. 1894.

Present: The Hon. John W. Stone, circuit judge.

The court opened for business in due form.

DORA MARKS
vs.
THE CHICAGO FURNITURE AND LUMBER COMPANY.

This cause having been settled, it is hereby discontinued by consent of both parties, without cost to either party.

J. W. STONE,
Circuit Judge.

STATE OF MICHIGAN:

The Circuit Court for the County of Delta.

DORA MARKS
vs.
THE CHICAGO FURNITURE AND LUMBER COMPANY.

I, O. V. Linden, clerk of the circuit court of said county and keeper of the records and seal therein, do hereby certify that the above and foregoing is a true and correct copy, compared by me, of the writ of attachment, inventory, appraisement, and all other papers filed in said cause and now in my custody, and of all journals, entries, and orders entered in said cause, and the whole thereof.

190 In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court, at Escanaba, in said county, this 17th day of February, A. D. 1897.

[Seal of the Circuit Court, Delta County, Michigan.]

O. V. LINDEN, *Clerk.*

STATE OF MICHIGAN, *Delta County,* } *ss:*

In the Circuit Court of the State of Michigan in and for Delta County.

DORA MARKS
vs.
CHICAGO FURNITURE & LUMBER COMPANY.

I, John W. Stone, judge of the circuit court of Delta county, State of Michigan, do hereby certify that O. V. Linden, whose name is subscribed to the preceding exemplification, is the clerk of the said circuit court, duly appointed and sworn, and that full faith and credit are due his official acts. I further certify that the seal affixed to the said exemplification is the seal of the said circuit court of Delta county, Michigan, and that the attestation thereof is in due form of law.

Dated Escanaba, Mich., Feb'y 16th, 1897.

J. W. STONE,
Circuit Judge.

STATE OF MICHIGAN, *Delta County,* } *ss:*

In the Circuit Court of the State of Michigan in and for Delta County.

191–305 DORA MARKS
vs.
THE CHICAGO FURNITURE AND LUMBER COMPANY.

I, O. V. Linden, clerk of the circuit court of Delta county, State of Michigan, do hereby certify that J. W. Stone, whose name is subscribed to the preceding certificate, is the judge of the circuit court

for the county of Delta, State of Michigan, duly elected and sworn, and that the signature of said judge to said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court this 17th day of February, A. D. 1897.

[Seal of the Circuit Court, Delta County, Michigan, D. C.]

O. V. LINDEN, *Clerk.*

* * * * * * *

306 PLAINTIFF'S EXHIBIT "11."

Articles of agreement, made and entered into this 14th day of July, A. D. 1894, by and between the Chicago Furniture and Lumber Company, a corporation, of the city of Escanaba, Delta county, Michigan, parties of the first part and Dora Marks of Denver, Colorado, party of the second part. Party of the first part agrees to purchase the twenty thousand dollar- ($20,000) worth of stock of the said Chicago Furniture and Lumber Company, which the party of the second part holds, for the sum of $4,000 to be paid for as follows: $1,000 to Mead and Jennings, attorneys for said party of the second part, as soon as the parties of the first part dispose of their treasury stock to the amount of $1,000 or interest other capital in said company to the amount of $1,000 and $3,000 to said party of the second part, on the day that the plant now occupied by the parties of the first part in said city of Escanaba is turned over to them, and a clear title to the property earned by them. Parties of the first part further agree to discontinue the damage suit now pending against the party of the second part without cost. Said parties of the first part further agree to release said party of the second part from all liability of said second party for the balance due on unpaid stock. Party of the second part agrees to sell her said stock of $20,000 to the parties of the first part and accept payment as aforesaid mentioned. Party of the second part also agrees to
307–310 discontinue the suit now pending under attachment proceedings against party of the first part, without cost. Said stock to be transferred as paid for.

In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

CHICAGO FURNITURE & LUMBER CO.,
Per N. NEUFELD, *Pres't.*

Witness:
SOLOMON GREENHOOT.

[SEAL.]

B. WOLF, *Sec't.*
DORA MARKS.

* * * * * * *

311 The foregoing was all the evidence offered or received on the trial of said cause.

And thereupon counsel for defendant again moved the court to

take the case from the jury; which motion was denied by the court; to which ruling the defendant then and there excepted.

And thereupon the court, on behalf of the plaintiff, gave to the jury the following instructions:

3. If from the evidence in the case and under the instructions of the court the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages, as charged in the declaration, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof and by considering them in connection with their own general knowledge and experience as intelligent business men.

4. The jury are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses
312 testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their sworn statements, in view of all the other evidence, facts, and circumstances proved on the trial, and from these circumstances determine on which side is the weight of preponderance of the evidence.

5. The preponderance of evidence does not consist alone in the greater number of witnesses testifying to a particular fact or state of facts. The apparent consistency, fairness, and congruity of the evidence and the reputation of the witnesses for truth and veracity, where this is shown by the evidence, are all facts to be considered by you in determining the preponderance of the evidence on either side; you may regard all the surrounding facts and circumstances proved on the trial and give credence to one witness over the other if you think such facts and circumstances warrant it.

6. If the jury believe from the evidence that any witness has wilfully sworn falsely on this trial as to any matter or thing material to the issues in the case, then the jury are at liberty to disregard his or her entire testimony, except in so far as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

313 7. If from the evidence in the case and under the instructions of the court the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages, as charged in the declaration, the court instructs the jury that they may estimate the amount of damages sustained by the plaintiff as the amount of money she was induced, if the evidence shows she was induced, to part with by means of the false and fraudulent representations made to her by the defendants, if the jury find from the evidence that they were false and fraudulent representations, less such sum or sums of money or other property which the plaintiff has received on account of the said amount of money which she was so induced to part with.

To the giving of which instructions by the court and to each of them the defendant, by his counsel, then and there excepted.

And thereupon the court, on behalf of the defendant, gave to the jury the following instructions:

1. You are instructed that under the law a misrepresentation must relate to some past or existing fact or state of facts, and that a mere promise as to what one will do in the future does not constitute a misrepresentation, even if such party does not thereafter do what he promised. In other words, the law is that no representation of a future event, whether in the form of a promise or not, can be a false pretence, for a false pretence must relate to the past or the present.

2. You are instructed that if you find from the evidence that the plaintiff signed a contract on June 8th, 1893, to subscribe for
314 stock, then any misrepresentations made to her after that time with a view to getting her to make such subscription are immaterial and should be disregarded by the jury.

3. The court instructs the jury that in order for the plaintiff to establish her case it is not sufficient for her to prove that the defendant made to her the false representations alleged to have been made, but she must also prove that she relied upon such misrepresentations, and if the jury find from the evidence that such misrepresentations were in fact made, but that the plaintiff did not rely upon them, then your verdict must be for the defendant.

4. You are instructed that the plaintiff cannot maintain this cause unless the evidence shows not only that the defendant not only made to her the false representations alleged in the declaration, but that she relied upon such statements made by the defendant. If, therefore, the jury believe from the evidence that she entered into and signed a contract regarding her subscription before the time such representations were made, then I instruct you, as a matter of law, that the plaintiff did not in fact rely upon such representations, and your verdict must be for the defendant.

5. You are instructed that if you find from the evidence that the misrepresentations claimed by the plaintiff to have been made to her were in fact made by the defendant and relied upon by the plaintiff, yet that the plaintiff cannot recover in this case unless she proves that she was actually damaged by such false represen-
315 tations, and this damage, which is an essential element of an action of this character, must actually and certainly have taken place before this suit was brought. If such damage is not shown to have taken place at such time your verdict must be for the defendant.

6. Upon this question of damage the court further instructs you that in an action of this character a plaintiff can recover only the amount of damage actually proven, and that possible or probable damage cannot be recovered.

7. You are instructed that it is not every false statement of fact that constitutes a misrepresentation, for an action of deceit will lie. To constitute a misrepresentation upon which an action of deceit can be based the evidence must show not merely that a false state-

ment of facts has been made, but that such misstatement was wilfully and knowingly made by the defendant.

9. You are instructed that the presumption of the law is that a paper is executed the day it bears date.

10. You are instructed that a party is presumed by law to have read an instrument signed by him, and also presumed to know the contents thereof.

11. The jury are instructed that even an illiterate person will be bound if he signs an instrument without requiring it to be read.

12. You are instructed that the presumption of the law that the party reads an instrument signed by him cannot be overcome by the mere statement of such party that he did not read it. But
316–318 in order to overcome such presumption he must prove not only that he did not read such paper, but that he was prevented from doing so by some trick or artifice practiced upon him by another.

13. You are instructed that when a party denies that an instrument bearing a certain date and purporting to be executed by him was in fact executed by him on that date, then it is incumbent upon him to prove by evidence that such instrument was in fact not executed by him upon the day it bears date.

15. The court further instructs you that when a plaintiff has accepted satisfaction in full for the jury done him, from whatever source it may come, the law will not permit him to recover again for the same damages.

17. You are instructed that if you find from the evidence that the plaintiff herein instituted a suit in the circuit court of Delta county, Michigan, against the Chicago Furniture & Lumber Company for the purpose of recovering the $4,000 involved in this suit now before you, and that she made a settlement of this cause with the defendant therein or any one else, that the plaintiff is barred from the further prosecution of this suit, and the verdict of the jury must be for the defendant.

And thereupon the court, at the request of the defendant, instructed the jury especially as follows:

Q. Was the agreement signed by Louis H. Jacobs, Nathan Neufeld, and Dora Marks, dated at Escanaba, Mich., June 8th, 1893, signed by plaintiff on said date?

* * * * * * *

319 STATE OF ILLINOIS, } ss.:
County of Cook, }

In the Circuit Court of Cook County.

DORA MARKS }
vs. }
LOUIS H. JACOBS. }

And now comes the defendant, Louis H. Jacobs, by Blum & Blum, his attorneys, and moves the court to set aside the verdict rendered herein and the special finding of the jury herein, and grant a new

trial in this cause, and for grounds in support of his said motion he shows the following:

1. The court erred in admitting improper, incompetent, irrelevant, and immaterial testimony offered on behalf of the plaintiff over the objection of the defendant.

2. The court improperly refused to admit proper evidence offered on behalf of the defendant.

3. The court erred in giving in the instructions and each of them asked on behalf of the plaintiff.

4. The court erred in refusing to give instructions No. 8, 14, 16, 18, 19, 20, and 21, and each of them, asked by the defendant.

5. The finding of the jury is in disregard of and contrary
320 to the instructions of the court.

6. The verdict is contrary to the law and the evidence in the case.

7. The verdict and the action of the court fail to give full faith and credit to the judgment of the circuit court of Delta county, Michigan, in the case of Dora Marks *vs.* The Chicago Furniture and Lumber Company, contrary to art. 4, sec. 1, of the Constitution of the United States, which provides:

"Full faith and credit shall be given in every State to the public acts, records and judicial proceedings of every other State."

8. The court erred in making improper remarks in the presence and hearing of the jury.

And the defendant especially excepts to the only special finding of the jury in response to the following questions asked by the court at the instance of the defendant's attorneys, to wit:

Q. Was the agreement signed by Louis H. Jacobs, Nathan Neufeld, and Dora Marks, dated at Escanaba, Mich., June 8th, 1893, signed by plaintiff on said date? To which question the jury answered "No," on the ground that such finding is contrary to the evidence in the case.

BLUM & BLUM,
Attorneys for Defendant.

* * * * * * *

321 Be it remembered that heretofore, to wit, on the 29th day of January, A. D. 1898, a certain appeal bond was filed in the office of the clerk of said court in words and figures following, to wit:

Appeal Bond.

Appellate Court.

Know all men by these presents that we, Louis Jacobs and Fannie Jacobson, of the county of Cook and State of Illinois, are held and firmly bound unto Dora Marks, also of the same county and State, in the penal sum of two hundred and fifty dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 22nd day of January, A. D. 1898.

The condition of the above obligation is such that whereas the said Dora Marks did on the 29th day of November, A. D. 1897,
322 in the circuit court of Cook county, in the State aforesaid, and of the November term thereof, A. D. 1897, recover a judgment against the above-bounden Louis Jacobs for the sum of four thousand dollars and — cents and sustaining the attachment in said cause, besides costs of suit, from which said judgment of the said circuit court of Cook county the said Louis Jacobs has prayed for and obtained an appeal to the appellate court within and for the first district in said State:

Now, therefore, if the said Louis Jacobs shall duly prosecute his said appeal with effect, and, moreover, pay the amount of the judgment, costs, interests, and damages rendered and to be rendered against him in case the said judgment shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

LOUIS JACOBS. [SEAL.]
FANNIE JACOBSON. [SEAL.]

R. W. CLIFFORD,
Judge Circuit Court.

O K.
J. W. BYAM,
Att'y for Pl'ff.

STATE OF ILLINOIS, } ss.:
Cook County, }

I, John A. Cooke, clerk of the circuit court of Cook county and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record, except the bill of exceptions, the
323 original of which is incorporated herein by stipulation, in a certain cause lately pending in said court, on the common-law side thereof, between Dora Marks, plaintiff, and Louis Jacobs, defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 15th day of February, 1898.

[SEAL.] JOHN A. COOKE, *Clerk.*

In the Appellate Court of Illinois, First District, March Term, A. D. 1898.

LOUIS H. JACOBS, Appellant,
vs.
DORA MARKS, Appellee. } Assignment of Errors.

And now comes the appellant, Louis H. Jacobs, by Blum & Blum, his attorneys, and says that in the record and proceedings aforesaid

and in rendering the judgment aforesaid there is manifest error in this:

1st. The court erred in advancing said cause for trial and trying it on said advancement during the existence of the judgment of conviction against defendant.

2nd. The court erred in denying defendant's motion to quash the attachment.

3rd. The court erred in denying the motion of appellant to take the case from the jury.

4th. The court erred in admitting improper testimony offered on behalf of the plaintiff.

5th. The court erred in refusing to admit proper evidence offered on behalf of the defendant.

6th. The court erred in refusing to give proper instructions offered on behalf of defendant (appellant herein).

324 7th. The verdict and judgment herein are contrary to the law and the evidence in the case.

8. The court erred in refusing to grant the motion of the defendant to set aside the verdict herein and to grant a new trial.

9. The court erred in refusing to set aside the special finding of the jury herein.

10. The court erred in failing to give full faith and credit to the judgment, records, and judicial proceedings of the circuit court of Delta county, Michigan, in the cause of Dora Marks *vs.* The Chicago Furniture & Lumber Company, as required by art. 4, sec. 1, of the Constitution of the United States, which provides: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

11. The court erred in overruling defendant's demurrer to the declaration in this cause.

12. The court erred in overruling defendant's motion in arrest of judgment.

By reason whereof appellant prays that said judgment may be reversed, etc.

LOUIS H. JACOBS, *Appellant,*
By BLUM & BLUM, *His Attorneys.*

BLUM & BLUM,
Attorneys for Appellant.

325 In the Appellate Court, First District, Illinois.

LOUIS JACOBS, Appellant,
vs.
DORA MARKS, Appellee. } No. 7697. Appeal — Cook Circuit.

I, Thomas N. Jamieson, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked "A" is the original transcript of record filed in said appellate court on the 2 day of March, A. D. 1898, by said appellant.

In testimony whereof I have hereunto set my hand and seal of said court, at Chicago, this 24 day of July, A. D. 1899.

[SEAL.] THOMAS N. JAMIESON,
Clerk of the Appellate Court, First District, Illinois.

326 At a term of the appellate court begun and held at Chicago, on Tuesday, the seventh day of March, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the first district of the State of Illinois.

Present: Hon. Henry V. Freeman, presiding justice; Hon. Oliver H. Horton, justice; Hon. Henry M. Shephard, justice; Ernest J. Magerstadt, sheriff; Thomas N. Jamieson, clerk.

Filed Aug. 19, 1899.

C. MAMER,
Clerk of Supreme Court.

LOUIS JACOBS, Appellant,
vs.
DORA MARKS, Appellee. } No. 7697. Appeal to Cook Circuit.

Be it remembered that on the 18th day of July, A. D. 1899, it being one of the days of the March term, A. D. 1898, certain proceedings were had in said court and entered of record in words and figures following, to wit:

LOUIS JACOBS
vs.
DORA MARKS. } 7697. Appeal Circuit.

This cause, having this day been reached on the call of the docket, was argued by counsel for respective parties, and the court, not being fully advised in the premises, doth order that said cause be taken under advisement.

And afterwards, on the 24th day of January, A. D. 1899, the following proceedings were had and entered of record in said cause, to wit:

327 LOUIS JACOBS, Appellant,
vs.
DORA MARKS, Appellee. } No. 7697. Error to Cook. Appeal from Cook Circuit.

This judgment set aside as per order of Feb. 24, '99. Book 20, page 191.

On this day came again the said parties, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid there is manifest error; therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the judgment of the circuit court of Cook county in this behalf rendered be reversed,

annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court of Cook county for such other and further proceedings as to law and justice shall appertain.

And it is further considered by the court that the said appellant recover of and from the said appellee his costs by him in this behalf expended, to be taxed, and that he have execution therefor.

And afterwards, on the 31 day of January, A. D. 1899, the following proceedings were had and entered of record in said cause, to wit:

LOUIS JACOBS
vs. } 7697. Appeal Circuit.
DORA MARKS.

328 This day came appellant, by his counsel, and moved the court to strike out the remanding clause in the judgment rendered by this court, and the court, being fully advised in the premises, doth order that said motion be, and the same is hereby, denied.

And afterwards on the 24th day of February, A. D. 1899, the following proceedings were had and entered of record in said cause, to wit:

LOUIS JACOBS
vs. } 7697. Appeal Circuit.
DORA MARKS.

The court, having considered the petition of appellee praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be allowed, and that the judgment heretofore entered in this cause be, and the same is hereby, vacated and set aside, and this cause is now taken by this court under advisement.

And afterwards, on the 26th day of May, A. D. 1899, the following proceedings were had and entered of record in said cause, to wit:

LOUIS JACOBS, Appellant,
vs. } No. 7697. Error to Cook. Appeal from Cook Circuit.
DORA MARKS, Appellee.

On this day came again the said parties, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the
329 premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error: Therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwith-

standing the said matters and things therein assigned for error; and it is further considered by the court that the said appellee recover of and from the said appellant her costs by her in this behalf expended, to be taxed, and that she have execution therefor.

And afterwards, on the 15th day of June, A. D. 1899, the following proceedings were had and entered of record in said cause, to wit:

LOUIS JACOBS
vs.
DORA MARKS. } 7697. Appeal Circuit.

This day came appellant, by his counsel, and moved the court for an appeal from the order and judgment of this court in said cause to the supreme court of Illinois; and the court, being fully advised in the premises, doth order that an appeal be allowed herein to the said supreme court on condition that appellant doth, within twenty days from this date, execute and file in said cause a good and sufficient appeal bond, conditioned according to law, in the penal sum of forty-five hundred dollars, with surety thereto to be approved by the court.

And afterwards, on the 15th day of June, A. D. 1899, the following proceedings were had and entered of record in said cause, to wit:

I, Thomas N. Jamieson, clerk of the appellate court in and
330 for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order and judgment and all other proceedings of the said appellate court in the above-entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 24th day of July,
[SEAL.] in the year of our Lord one thousand eight hundred and ninety-nine.

THOMAS N. JAMIESON,
Clerk of the Appellate Court of the First District.

In the Supreme Court of Illinois, October Term, A. D. 1899.

LOUIS JACOBS, Plaintiff in Error,
vs.
DORA MARKS, Defendant in Error.

And now comes the plaintiff in error, LOUIS JACOBS, by Blum & Blum, his attorneys, and says that in the record and proceedings aforesaid and in the judgment aforesaid there is manifest error in this:

First. The circuit court erred in advancing said cause for trial against the objection of plaintiff in error and trying it on said advancement during the existence of the judgment of conviction against defendant in the criminal case, and the appellate court erred in not reversing said judgment for said cause.

Second. The circuit court erred in denying the motion of
331 plaintiff in error to quash the writ of attachment herein, and the appellate court erred in not reversing said judgment for said cause.

Third. The circuit court erred in denying the motion of the plaintiff in error to take the case from the jury, and the appellate court erred in not reversing said judgment for said cause.

Fourth. The appellate court erred in not reversing said judgment by reason of the circuit court's improper admission of testimony offered on behalf of the defendant in error herein.

Fifth. The appellate court erred in not reversing said judgment, by reason of the refusal of the circuit court to admit proper evidence offered on behalf of the plaintiff in error herein.

Sixth. The appellate court erred in not reversing said judgment by reason of the refusal of the circuit court to give proper instructions offered on behalf of the plaintiff in error herein.

Seventh. The appellate court erred in not reversing said judgment as contrary to the law and the evidence in the case.

Eighth. The appellate court erred in not reversing said judgment by reason of the refusal of the circuit court to grant the motion of the plaintiff in error to set aside the verdict herein and grant a new trial.

Ninth. The appellate court erred in refusing to reverse the said judgment by reason of the circuit court's error in refusing to set aside the special finding of the jury herein.

Tenth. The appellate court erred in not reversing said judgment by reason of the error of the circuit court in failing to give full faith and credit to the judgment, record, and judicial proceedings of the circuit court of Delta county, Michigan, in the case of Dora Marks *vs.* The Chicago Furniture & Lumber Company, in evidence in this cause, as required by article four, section one, of the Constitution of the United States, which provides, "Full faith and credit shall be given in each State to the public acts, records and judicial
332 proceedings of every other State."

Eleventh. The appellate court erred in not reversing said judgment by reason of the error of the circuit court in overruling defendant's demurrer to the declaration in this cause.

Twelfth. The appellate court erred in not reversing said judgment by reason of the error of the circuit court in overruling the motion in arrest of judgment made by the plaintiff in error.

Thirteenth. The appellate court erred, as did the circuit court, in failing to give full faith and credit to the judgment of the circuit court of Delta county, Michigan, rendered in the case of Dora Marks *vs.* The Chicago Furniture & Lumber Company, and introduced in evidence in this cause, which judgment is as follows: "This cause having been settled, it is hereby discontinued by consent of both parties without cost to either party," as required by said article four, section one, of the Constitution of the United States.

Fourteenth. The courts below erred in failing to hold that said judgment of the circuit court of Delta county, Michigan, constitutes a complete bar to the present cause of action.

Fifteenth. The appellate court erred in not reversing said judgment as against the law.

By reason whereof plaintiff in error prays that said judgment may be reversed, etc.

LOUIS JACOBS,
Plaintiff in Error,
By BLUM & BLUM,
His Attorneys.

BLUM & BLUM,
Attorneys for Plaintiff in Error.

333 At a supreme court begun and held at Springfield on Tuesday, the third day of October, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: James H. Cartwright, chief justice; Alfred M. Craig, justice; Benjamin D. Magruder, justice; Jacob W. Wilkin, justice; Jesse J. Phillips, justice; Joseph N. Carter, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

334 Be it remembered that afterwards, to wit, on the fourth day of October, A. D. 1899, there was filed in the office of the clerk of said court a certain certificate of publication and entry of appearance in the words and figures following, viz:

Review Printing and Publishing Co., a corporation, publisher of the Chicago Daily Law Bulletin,

Does hereby certify it is the publisher of the Chicago Daily Law Bulletin, and that a notice, of which the annexed printed slip is a true copy, was published for four successive weeks, to wit, four times, in the Chicago Daily Law Bulletin, a secular newspaper published in the city of Chicago, county of Cook and State of Illinois, and of general circulation throughout said county and State, and that the date of the first paper containing the same was the 16th day of August, A. D. 1899, and that the date of the last paper containing same was the 9th day of September, A. D. 1899, and that said company has received $8.50 *dollars* for publishing the same.

Dated at Chicago this 11th day of September, 1899.

REVIEW PRINTING AND PUBLISHING CO., *Publishers,*
By A. G. NEWELL, *Secretary.*

Blum & Blum, 87 Washington St., room 508.

STATE OF ILLINOIS:

Supreme Court.

LOUIS H. JACOBS } *Error to* Appellate Court of Illinois, First District.
vs.
DORA MARKS. }

Whereas the said Louis Jacobs has sued out a writ of error from said supreme court to reverse a judgment obtained by said Dora Marks against said Louis Jacobs in the said appellate court of Illinois, first district, which said writ of error is now pending in said supreme court; and whereas a writ of *scire facias* has been
335 issued herein, returnable on the first day of the next term of said supreme court, to be holden at Springfield, in said State, on the first Tuesday in October next, according to law; and whereas also it appears by affidavit on file in the clerk's office of said supreme court that the said Dora Marks is a non-resident of the State of Illinois and without the reach of the process of said supreme court:

Now, therefore, you, the said Dora Marks, the said defendant in error, whose non-residence appears as aforesaid, are hereby notified to be and appear before the justices of said supreme court at the next term of said court, to be holden at Springfield, in said State, on the first Tuesday in October next, to hear the record and proceedings brought into said supreme court on return of said writ of error and the errors assigned, if you shall see fit, and further to do and receive what said court shall order in this behalf.

Dated this 18th day of August, A. D. 1899.

CHRISTOPHER MAMER, *Clerk.*

BLUM & BLUM, *Attorneys.* 19–26–2–9.

In the Supreme Court of Illinois, October Term, A. D. 1899.

LOUIS JACOBS, Plaintiff in Error, } Writ of Error to Appellate
vs. Court, First District.
DORA MARKS, Defendant in Error. }

We hereby enter the appearance of Dora Marks, defendant in error, and ourselves as her attorneys.

JOHN W. BYAM.
C. L. MAHONEY.

Dated Sept. 30, 1899.

336 And afterwards, to wit, on the 12th day of October, A. D. 1899, certain proceedings were had in said court in words and figures following, viz:

LOUIS JACOBS
vs. } 919. Error to First District.
DORA MARKS.

And now, on this day, comes the said defendant in error and moves the court for leave to file certified copy of appellate-court abstract; which said motion is, by the court, denied.

And afterwards, to wit, on the 14th day of October, A. D. 1899, certain proceedings were had in said court as follows, viz:

LOUIS JACOBS
vs. } 919. Error to First District.
DORA MARKS.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that plaintiff in error hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said defendant in error having entered motion to affirm said judgment and for costs and *procedendo*, and said motion being taken under advisement for final hearing and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

337 At a supreme court begun and held at Springfield, on Tuesday, the fifth day of December, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: James H. Cartwright, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; Joseph N. Carter, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to wit, on the eighteenth day of December, A. D. 1899, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

LOUIS JACOBS
vs. } No. 919. Error to Appellate Court of Illinois, First District.
DORA MARKS.

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected as well the

record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error; therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding
338 the said matters and things therein assigned for error; and it is further considered by the court that the said defendant in error recover of and from the said plaintiff in error her costs by her in this behalf expended, and that she have execution therefor.

And thereupon there was filed the opinion of the court in the words and figures following, viz:

339 Docket No. 919, agenda 34, northern div., Oct., '99.

LOUIS JACOBS }
v.
DORA MARKS. }

Per Curiam:

This was an action for deceit, brought by Dora Marks, against Louis Jacobs. The plaintiff sued out an attachment in aid. The defendant appeared and pleaded to the declaration, to which replications were filed, and on a trial the plaintiff recovered a verdict and judgment for $4,000, which was affirmed by the appellate court.

Section 31 of chapter 11 of the statute provides: "That in all actions of trespass and trespass on the case, before a writ of attachment shall be issued the plaintiff, his agent or attorney, shall apply to a judge of a court of record or a master in chancery of the county in which the suit is pending and be examined, under oath, by such judge or master concerning the cause of action; and thereupon such judge or master shall endorse upon the affidavit the amount of damages for which the writ shall issue."

The abstract shows that the defendant entered a motion to quash the attachment, "on the ground that the court, before ordering attachment, did not examine the plaintiff, her agent or attorney, on oath, in open court, as to the character or nature of her case and the clerk had no authority to issue this attachment because the order does not recite that the said judge had examined the plaintiff on oath, etc., and because no order was ever issued by any judge of this court stating the amount for which attachment was issued." The court denied the motion. The statute does not contemplate that an examination should be made before a court in session, but merely that the party desiring an attachment should appear before a judge or a master in chancery; and upon an application of that character no record could well be made of the proceedings before the judge or master. Here it is conceded that the plaintiff appeared before the judge and made the application and the judge ordered the writ, but

what examination the judge made does not appear. It will, however, be presumed, in the absence of a contrary showing, that the judge heard such evidence and made such examination as the law required. We think the motion was properly denied.

It is next claimed in the argument that the plaintiff, both in her declaration and evidence, failed to make out a case. As to
340 the declaration, it appears from the record that the defendant demurred, and after the demurrer was overruled pleaded over. It is a well-settled rule that a plea to the merits after a demurrer has been overruled is a waiver of the defects in the declaration. If the declaration was insufficient and defendant desired to avail of such insufficiency he should have abided by the demurrer. Having failed to do so he cannot now complain of the declaration. It is true, there was here a motion in arrest of judgment; but this was not predicated on the ground that the declaration failed to state a cause of action, but, as appears on page 85 of the abstract, the motion was based on the ground that there was a material variance between the declaration and the evidence. If there was a variance and the defendant desired to avail of the objection, he should have objected to the introduction of the evidence when it was offered on the trial, and the variance should have been pointed out in order that the plaintiff might, if she desired, obviate the difficulty by amendment. He could not wait until the trial was over, and then avail of a variance on motion in arrest of judgment.

As to the evidence, upon an examination it will be found that it fairly tended to establish plaintiff's cause of action. Its sufficiency was settled by the judgment of the appellate court and cannot be considered here.

After defendant's demurrer to the declaration had been overruled in the circuit court, in addition to a plea of the general issue he filed special pleas, in which he set up, in substance, that the plaintiff, on or about the 4th day of December, 1893, instituted an action in the circuit court of Delta county, Michigan, against the Chicago Furniture and Lumber Company, to recover said sum; that service was duly had upon defendant, which entered its appearance in the cause, and said court acquired jurisdiction of the parties to said cause and subject-matter thereof; that afterwards said plaintiff and defendant came to a settlement of said cause, and at a general term of said court, on July 25, 1894, the court entered the following order: "This cause having been settled, it is hereby discontinued by consent of both parties, without cost to either party." The plaintiff filed replication, taking issue on the facts set up in the pleas. Upon the issue formed, evidence was introduced by the respective par-
341 ties, instructions were given to the jury, and a verdict was returned against the defendant on the issues presented. It is now claimed that the facts set up were a bar to plaintiff's action. A written contract was entered into between Dora Marks, the plaintiff, and the Chicago Furniture and Lumber Company, at the time the suit named in the plea was settled and discontinued, which was put in evidence on the trial. From that contract and the other evidence it appears that the furniture and lumber company never com-

plied with the contract under which the suit was discontinued, and the plaintiff never recovered a single dollar in satisfaction of her claim. If the plaintiff in the action had sued the furniture and lumber company and recovered the amount of her damages, and had received satisfaction thereof, it is no doubt true that she could not recover for the same thing from another. But no such case was presented by the evidence. Here, as the evidence showed and as found by the jury, there was no recovery by plaintiff of her damages and no satisfaction. The effect of the transaction between the plaintiff and the furniture and lumber company was a mere dismissal of her action or an abandonment of her action as against the furniture and lumber company, for which she recovered nothing in return, and we are aware of no principle upon which it can be held that the record in the furniture and lumber company case can be treated as a bar to the present action.

It appears that the circuit court, on application of the plaintiff, advanced the cause for a hearing, and this is relied upon as error. The statute authorized the court, for good cause shown, to advance the cause, and the facts shown to the court were in our opinion sufficient to authorize the action of the court.

We find no error in the judgment of the appellate court, and it will be affirmed.

Judgment affirmed.

342 STATE OF ILLINOIS, }
Supreme Court, Northern Grand Division, } *ss:*

I, Christopher Mamer, clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify that the foregoing pages, 339 to 341, inclusive, is a true copy of the opinion of the said supreme court in the above-entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Springfield, Aug. 22nd, A. D. 1900.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

C. MAMER,
Clerk of the Supreme Court.

343 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States of America, October Term, A. D. 1900.

LOUIS JACOBS, Plaintiff in Error,
vs.
DORA MARKS, Defendant in Error. } Assignment of Errors.

* * * * * * *

Now comes the plaintiff in error, Louis Jacobs, by Louis J. Blum and Edgar C. Blum, his attorneys, and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment

of the supreme court of Illinois in the above-entitled cause, and assigns error thereto as follows:

1. The court below erred in failing to give full faith and credit to the judicial record and proceedings of the circuit court of Delta county, State of Michigan, in the case of Dora Marks *vs.* The Chicago Furniture & Lumber Company, which records and proceedings included the following order of court: "This cause having been settled, it is hereby discontinued by consent of both parties;" which said suit, as shown by the evidence in this cause, involved the same subject-matter involved in the present suit, and which said judicial records and proceedings were duly pleaded in bar herein by the plaintiff in error and introduced in evidence on the trial of this cause; and, in failing to hold that said judgment, record, and proceedings of the Michigan court constituted a bar to the present action, the courts below failed to give full faith and credit to the record and judicial proceedings of the said circuit court of Delta county, Michigan, contrary to article 4 of the Constitution of the United States, which provides: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

2. The supreme court of Illinois erred in failing to reverse said judgment by reason of the failure of the courts below to give full faith and credit to said judicial records and proceedings of
344 the circuit court of Delta county, Michigan, as required by said article 4 of the Constitution of the United States.

3. The supreme court of Illinois erred in failing to reverse said judgment by reason of the refusal of the circuit court of Cook county to give the following instruction asked by the plaintiff in error:

"The jury are instructed that it appears by a certified copy of the record of the judgment entered in the case of Dora Marks *vs.* The Chicago Furniture & Lumber Company in the circuit court of Delta county, Michigan, that said cause was settled between said parties; that said cause pending in said Michigan court was based upon the same cause of action on which the present suit is based, and involved the same subject-matter, and that the settlement of said cause constituted a settlement of the present cause of action." By this refusal the said circuit court failed to give full faith and credit to the judicial records and proceedings of the said circuit court of Delta county, Michigan.

4. The court below erred in failing to reverse said judgment by reason of the refusal of the circuit court of Cook county to give the following instruction asked by the plaintiff in error:

"18. You are instructed that the undisputed evidence in this case shows that in December, 1893, the plaintiff herein brought a suit in the circuit court of Delta county, Michigan, against the Chicago Furniture & Lumber Company upon the same cause of action and involved the same subject-matter involved in this suit; that thereafter the parties to said suit came to a settlement thereof, and that settlement is a complete bar to the present action and your verdict must be for the defendant herein." By this refusal the said circuit court failed to give full faith and credit to the judicial records and

proceedings of the said circuit court of Delta county, Michigan, in evidence in this cause.

345. 5. The court below erred in failing to reverse said judgment by reason of the refusal of the circuit court of Cook county to give the following instruction asked by plaintiff in error:

"21. The jury are instructed to find a verdict for the defendant herein." By this refusal the said circuit court failed to give full faith and credit to the judicial records and proceedings of the said circuit court of Delta county, Michigan, in evidence in this cause.

6. The supreme court of Illinois erred in not reversing said judgment by reason of error of the circuit court in denying the motion of plaintiff in error to set aside the verdict and grant a new trial herein on the grounds specified in said motion for new trial that the verdict and the action of the court fail to give full faith and credit to the judgment of the circuit court of Delta county, Michigan, in the case of Dora Marks *vs.* The Chicago Furniture and Lumber Company, contrary to art. 4, sec. 1, of the Constitution of the United States, which provides: "Full faith and credit shall be given in every State to the public acts, records and judicial proceedings of every other State."

7. The judgment of the courts below failed to give full faith and credit to the judicial records and proceedings of the circuit court of Delta county, Michigan, in said case of Dora Marks *vs.* The Chicago Furniture & Lumber Company, and thus deprived the plaintiff in error of his rights and privileges under said article 4 of the Constitution of the United States.

Wherefore the said Louis Jacobs, plaintiff in error, prays the honorable court to examine and correct the errors assigned, and for a reversal of the judgment of the supreme court of Illinois entered in the above-entitled cause.

LOUIS JACOBS,
Plaintiff in Error,
By LOUIS J. BLUM AND
EDGAR C. BLUM,
His Attorneys.

LOUIS J. BLUM AND
EDGAR C. BLUM,
Attorneys for Plaintiff in Error.

346 In the Supreme Court of the United States, October Term, 1899.

LOUIS JACOBS, Plaintiff in Error,
vs.
DORA MARKS, Defendant in Error. } Petition for Writ of Error.

To the Honorable George Shiras, associate justice of the Supreme Court of the United States:

The petition of Louis Jacobs respectfully shows that on the eighteenth day of December, A. D. 1899, the supreme court of Illi-

nois rendered a judgment against your petitioner in a certain cause, wherein your petitioner was plaintiff in error and Dora Marks was defendant in error, in the sum of four thousand dollars and costs and awarded execution thereon, as will appear by reference to the record and proceedings in said cause; that said court is the highest court in said State in which a decision of said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under section 709 of chapter 11 of the Revised Statutes of the United States, authorizing writ of error to the State courts where any title, right, privilege, or immunity is claimed under the Constitution of the United States and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, because in said supreme court of Illinois, as well as in the other courts in which said cause was tried, and from which it was appealed to said supreme court of Illinois, your petitioner specially set up and claimed his right, under article 4 of the Constitution of the United States, to have certain judicial records and proceedings of the circuit court of Delta county, Michigan, in the case of Dora Marks against The Chicago Furniture & Lumber Company held as a bar to the further prosecution of the present case; that said judicial records and proceedings included this order of court: "This cause having been settled, it is hereby discontinued by consent of both parties;" that said judicial record and proceedings were duly pleaded in bar by your petitioner and introduced by him in evidence on the trial of this cause, and said suit of Dora Marks *vs.* The Chicago Furniture & Lumber Company involved the same subject-matter involved in the present suit, as shown by the evidence in this cause; and your
347 petitioner specially set up and claimed in the said supreme court of Illinois that the courts below, in failing to hold that said judicial records and proceedings of the Michigan court constituted a bar to the present action, failed to give full faith and credit to the record and judicial proceedings of the said circuit court of Delta county, Michigan, contrary to article 4 of the Constitution of the United States, which provides: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State;" and your petitioner specially set up and claimed that other errors were committed on said trial, to wit, the errors set forth in the assignment of errors in this court; that the decisions of the supreme court of Illinois and of the courts below were against said claim of your petitioner, all of which appears by the record of the proceedings in said cause, which is herewith submitted; and the reason for which this writ of error is prayed is by reason of the denial of the courts below of the said rights specially set up and claimed by your petitioner to have said judicial records and proceedings of the Michigan court held to be a bar to the present suit under said article 4 of the Constitution of the United States.

Wherefore your petitioner prays the allowance of a writ of error

returnable unto the Supreme Court of the United States and for a citation, and he will ever pray, etc.

LOUIS JACOBS, *Petitioner,*
By LOUIS J. BLUM AND
EDGAR C. BLUM,
Attorneys for Petitioner.

348 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Illinois, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Louis Jacobs, plaintiff in error, and Dora Marks, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Louis Jacobs, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of August, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

The writ of error this day, August 3d, 1900, allowed, and the writ is directed to be issued.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Ct. of the United States.

[Endorsed:] Supreme Court of the United States. Louis Jacobs, plaintiff in error, *vs.* Dora Marks, defendant in error. Writ of error.

349 Know all men by these presents that we, Louis Jacobs, as principal, and Michael McDonald, as surety, are held and firmly bound unto Dora Marks in the full and just sum of five hundred dollars, to be paid to the said Dora Marks, her certain attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of August, in the year of our Lord one thousand nine hundred.

Whereas lately, at a session of the supreme court of the State of Illinois, in a suit depending in said court between Louis Jacobs, plaintiff in error, and Dora Marks, defendant in error, a final judgment was rendered against the said Louis Jacobs, and the said Louis Jacobs having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Dora Marks, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Louis Jacobs shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

LOUIS JACOBS. [SEAL.]
MICHAEL C. McDONALD. [SEAL.]

Sealed and delivered in presence of—
LOUIS FEDER.
DANIEL M. ROTHSCHILD.

Approved:

——— ———,
Chief Justice of the Supreme Court of Illinois.

O K.
S. W. BURNHAM, *Clerk.*

[Endorsed:] Supreme Court of the United States. Louis Jacobs, plaintiff in error, *vs.* Dora Marks, defendant in error. Bond. And now, to wit, August 3d, 1900, the within bond is hereby approved. George Shiras, Jr., associate justice of the Supreme Court of the United States. Blum & Blum, attorneys and counselors at law, Chicago.

350 UNITED STATES OF AMERICA, *ss:*

To Dora Marks, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein Louis Jacobs is plaintiff in error and Dora Marks is defendant in error, to show cause, if any there be, why the judgment rendered against the said Louis Jacobs, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this third day of August, in the year of our Lord one thousand nine hundred.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

STATE OF ILLINOIS, }
Cook County, } ss:

On this 15th day of August, in the year of our Lord one thousand nine hundred, personally appeared Michael Gesas before me, the subscriber, Daniel M. Rothschild, a notary public in and for Cook county, State of Illinois, and makes oath that he delivered a true copy of the within citation to John W. Byam, the attorney for said Dora Marks, and who was her attorney of record in the supreme court of Illinois in the within cause up to final judgment therein by said supreme court, and he has never withdrawn as such attorney.

MICHAEL GESAS.

Sworn to and subscribed the 15th day of August, A. D. 1900.

[Seal of Daniel M. Rothschild, Notary Public, Cook Co., Ill.]

DANIEL M. ROTHSCHILD,
Notary Public.

Received a copy of the within citation August 18th, 1900.

CHARLES L. MAHONEY,
Att'y for Dora Marks.

351 STATE OF ILLINOIS, }
County of Cook, } ss:

LOUIS JACOBS, Plaintiff in Error, }
vs.
DORA MARKS, Defendant in Error. }

* * * * * * *

On this 21st day of August, 1900, personally appeared Michael Gesas before me, the subscriber, Daniel M. Rothschild, a notary public in and for Cook county, State of Illinois, and made oath that he delivered a true copy of the within and annexed citation to Charles L. Mahoney on August 18th, 1900, and likewise delivered a true copy thereof to A. J. Hirschl and Adolph Kurz on the 20th day of August, 1900, and on the 21st day of August he also delivered a true copy of the said citation to said Adolph Kurz for James Rosenthal, the said James Rosenthal being at the said time a partner in the law business of Adolph Kurz and A. J. Hirschl and being

at this time without the State of Illinois; that John W. Byam, Charles L. Mahoney, A. J. Hirschl, Adolph Kurz, and James Rosenthal were all the persons who appeared of record as the attorneys of said Dora Marks in said cause in the supreme court of Illinois, wherein Louis Jacobs was plaintiff in error and Dora Marks was defendant in error, and that no other attorney appeared for her in said cause or has since appeared for her in said cause.

MICHAEL GESAS.

Subscribed and sworn to before me this 21st day of August, 1900.

[Seal of Daniel M. Rothschild, Notary Public, Cook Co., Ill.]

DANIEL M. ROTHSCHILD,
Notary Public.

[Endorsed:] Supreme Court of the United States. Louis Jacobs, plaintiff in error, *vs.* Dora Marks, defendant in error. Citation. To the Supreme Court of the United States.

352 In the Supreme Court of Illinois.

LOUIS JACOBS
vs.
DORA MARKS. } Error to Appellate Court, First District.

I, Christopher Mamer, clerk of the supreme court of Illinois, elected for the northern grand division, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from one (1) to three hundred and fifty-one (351), inclusive, contains a true and complete transcript and copy of the record and proceedings had in said court in the case which is above entitled and of the whole thereof, including the opinion of the court, as the same remain of record and on file in my said office, and also the original writ of error and citation, with return thereon, copies of which said writ of error and citation have been lodged in my office, at Springfield, Illinois.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court of Illinois to be hereunto affixed, at Springfield, this 24th day of August, in the year of our Lord one thousand nine hundred.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

{ Ten-cent United States internal-revenue stamp, canceled Aug. 24, 1900. C. M. }

353 In the Supreme Court of the United States, October Term, 1900.

LOUIS JACOBS, Plaintiff in Error,
vs.
DORA MARKS, Defendant in Error.

* * * * * * *

To the Honorable James H. McKenney, clerk of said court:

Please take notice that, under rule ten, ninth paragraph, of said court, we have, on behalf of the plaintiff in error herein, prepared a statement of errors on which he intends to rely, and have designated the parts of the record which he thinks necessary for the consideration thereof, and have served on the adverse party a copy of such statement and parts of record, in accordance with said rule, which said statement of errors and designation of parts of the record, together with service of notice on the adverse party and acceptance of service, are hereto annexed, to be printed under your supervision for the use of the court, in accordance with the rules of the court.

Also that the attorneys for the defendant in error have, under said rule ten, designated additional parts of the record which they think material, and have served us with a copy thereof, and we consent that such parts of the record be also printed in the record to be prepared by you for the use of the court, in accordance with said rule ten, such additional parts being hereto attached.

LOUIS J. BLUM,
EDGAR C. BLUM,
Attorneys for Plaintiff in Error.

354 In the Supreme Court of the United States of America, October Term, A. D. 1900.

LOUIS JACOBS, Plaintiff in Error,
vs.
DORA MARKS, Defendant in Error.

* * * * * * *

Statement of errors relied on and part of record deemed necessary for the consideration thereof, filed with the clerk of said court under ninth paragraph of rule ten.

The errors relied upon are as follows:

1. The court below erred in failing to give full faith and credit to the judicial record and proceedings of the circuit court of Delta county, State of Michigan, in the case of Dora Marks *vs.* The Chicago Furniture & Lumber Company, which records and proceedings included the following order of court: "This cause having been settled, it is hereby discontinued by consent of both parties;" which said suit, as shown by the evidence in this cause, involved the same subject-matter involved in the present suit, and which said judicial records and proceedings were duly pleaded in bar herein by the plaintiff in error and introduced in evidence on the trial of this

cause; and, in failing to hold that said judgment, record, and proceedings of the Michigan court constituted a bar to the present action, the courts below failed to give full faith and credit to the record and judicial proceedings of the said circuit court of Delta county, Michigan, contrary to article 4 of the Constitution of the United States, which provides: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

2. The supreme court of Illinois erred in failing to reverse said judgment by reason of the failure of the courts below to give full faith and credit to said judicial records and proceedings of the circuit court of Delta county, Michigan, as required by said article 4 of the Constitution of the United States.

3. The supreme court of Illinois erred in failing to reverse said judgment by reason of the refusal of the circuit court of Cook county to give the following instructions asked by the plaintiff in error: "The jury are instructed that it appears by a certified
355 copy of the record of the judgment entered in the case of Dora Marks *vs.* The Chicago Funiture & Lumber Company in the circuit court of Delta county, Michigan, that said cause was settled between said parties; that said cause pending in said Michigan court was based upon the same cause of action on which the present suit is based, and involved the same subject-matter, and that the settlement of said cause constituted a settlement of the present cause of action." By this refusal the said circuit court failed to give full faith and credit to the judicial records and proceedings of the said circuit court of Delta county, Michigan.

4. The court below erred in failing to reverse said judgment by reason of the refusal of the circuit court of Cook county to give the following instruction asked by the plaintiff in error:

"18. You are instructed that the undisputed evidence in this case shows that in December, 1893, the plaintiff herein brought a suit in the circuit court of Delta county, Michigan, against the Chicago Furniture & Lumber Company upon the same cause of action and involved the same subject-matter involved in this suit; that thereafter the parties to said suit came to a settlement thereof, and that settlement is a complete bar to the present action, and your verdict must be for the defendant herein." By this refusal the said circuit court failed to give full faith and credit to the judicial records and proceedings of the said circuit court of Delta county, Michigan, in evidence in this cause.

5. The court below erred in failing to reverse said judgment by reason of the refusal of the circuit court of Cook county to give the following instruction asked by plaintiff in error:

"21. The jury are instructed to find a verdict for the defendant herein." By this refusal the said circuit court failed to give full faith and credit to the judicial records and proceedings of the said circuit court of Delta county, Michigan, in evidence in this cause.

6. The supreme court of Illinois erred in not reversing said judgment by reason of error of the circuit court in denying the motion of plaintiff in error to set aside the verdict and grant a new trial

herein on the grounds specified in said motion for a new trial, that the verdict and the action of the court fail to give full faith and credit to the judgment of the circuit court of Delta county, Michigan, in the case of Dora Marks *vs.* The Chicago Furniture and Lumber Company, contrary to art. 4, sec. 1, of the Constitution of the United States, which provides: "Full faith and credit shall be given in every State to the public acts, records, and judicial proceedings of every other State."

356 7. The judgment of the courts below failed to give full faith and credit to the judicial records and proceedings of the circuit court of Delta county, Michigan, in said case of Dora Marks *vs.* The Chicago Furniture & Lumber Company, and thus deprived the plaintiff in error of his rights and privileges under said article 4 of the Constitution of the United States.

The parts of the record deemed necessary for the consideration of these questions are as follows:

Page	
1	Placita of the supreme court as follows: Beginning from top of page, including the words "which said transcripts are in the words and figures following, viz:"
2–3	*Scire facias.*
3–4	Citation.
5	Full page, containing placita circuit court, Cook county.
6	Summons down to and including return.
10–13	Plaintiff's declaration stating her cause of action (to be set out in full).
15–16	Appearance of attorneys for defendant, Louis Jacobs (to be set out in full).
24	The last replication, being the replication that takes issue on the plea of general issue.
25–34	Additional pleas, being pleas of satisfaction setting up the judgment of the circuit court of Delta county, Michigan, in Marks *vs.* Chicago Furniture & Lumber Company (to be set out in full).
36	Replication to additional pleas (in full).
37	Plea of general issue of defendant " "
38	Verdict of jury, as follows: "We, the jury, find the defendant guilty and assess the plaintiff's damages at four thousand dollars ($4,000)."
39	Judgment of court on verdict and allowance of appeal, beginning from the words in the 4th line "Thereupon, on motion of plaintiff's attorney."
42	The order of court granting leave to defendant to file additional pleas.
45	Order overruling defendant's motion for a new trial. Also order reducing appeal bond to $250.00.

47 MARKS
vs.
JACOBS.

Bill of Exceptions.

357 Be it remembered that this case came on for trial on the 14th day of July, A. D. 1897, before his honor Richard W. Clifford, one of the judges of said court, at the court-house, in the city of Chicago, county of Cook and State of Illinois, at 3 o'clock p. m., John W. Byam, Esq., and C. L. Mahoney, Esq., appearing for the plaintiff, and Messrs. Blum & Blum for the defendant; whereupon the plaintiff, to maintain the issues on her part in this behalf, introduced the following testimony—that is to say:

DORA MARKS, plaintiff, being first duly sworn, testified in her own behalf as follows:

Direct examination by Mr. BYAM:

Q. What is your name?
A. Dora Marks.
Q. Do you know the defendant in this case?
A. Yes, sir.
57 Jacobs went up to Escanaba and he was gone two nights.
Q. Did Neufeld go with him?
58 A. Neufeld went with him, and he returned early in the morning, about seven or eight o'clock, and he rapped at our door and he says to his wife and I, "Hurry up and get up; I must tell you all about this plant up at Escanaba." So we got up and dressed ourselves, and he went on telling what a glorious plant there was at Escanaba and what a big thing he had there.
We met every day, and the 6th of June he asked me to go up to Escanaba.
59 After breakfast, Mr. Jacobs, Mr. Neufeld, and Mrs. Jacobs and I went down to the factory to see this plant, and they showed me the plant.
62 Well, on the train Mr. Jacobs says, Now, he says, this is a big thing, he says, "and I would like to have you in with us because I know we are going to make lots of money."
63 I asked Mr. Jacobs, I says, "Who is Neufeld?" "Well," he said, "when I left Bradford I worked for Neufeld five years." He says, "You know that I am now living in Neufeld's house. I brought my bride right to this house. Neufeld is a wealthy man and a popular man." I says, "If he is a wealthy man what has he got?" "Well," he says, "he has a factory that is worth sixty thousand dollars," and I made the remark, "Has it any incumbrances on like I have incumbrances on my property in Denver?"

He says, "No; he don't need any incumbrances; his property is clear."

64 "Well," I says, "what else has he got?" He says, "He owns the house he is living in." I says, "What
358 is this house worth?" He says, "Twenty thousand dollars." I says, "Encumbered?" He says, "No encumbrance; and another thing, Neufeld has got money; he can go to the bank any time he wants and draw five or ten thousand dollars cash." And so I says to him, "How much cash have you got?" "Well," he says, "I have got twelve thousand five hundred dollars cash." I says, "Where have you got it?" He says, "I have got it so I can lay my hands on it." I says, "How much cash is Neufeld going to put into this?" and he says, "Twenty-five thousand dollars."

Q. Did he say where the factory was that Neufeld owned?

A. Yes; 413 to 419 West Fifteenth street.

Q. And the house, where was that?

A. 220 South Morgan street.

66 So I went down to the house on the 12th of June, and I met Gallup at Neufeld's house, and Mr. Jacobs says, "Mr. Gallup is here with the corporation papers to incorporate."

Q. What further was done there?

A. We signed the corporation papers there.

67 Q. Is that the paper that was signed?

A. Yes, sir.

Paper introduced in evidence and marked Plaintiff's Exhibit One.

67–68 Plaintiff's Exhibit 1 down to the words State of Michigan, county of Delta, *ss.*

70 And I took my certificate, and Jacobs wrote on it Chicago Furniture & Lumber Company, and I endorsed it, and Mr. Neufeld left that night for Escanaba to start the works.

74 Q. Did you get any of that money back of that seven thousand dollars certificate?

A. I received $2,000.00 back.

80 —. Did you get any stock of that concern?

A. Yes, sir.

Q. Have you got it with you?

A. Yes, sir.

Certificates introduced in evidence and marked Plaintiff's Exhibit 7.

81–82 Plaintiff's Exhibit 7 being the certificate of her stock in the Chicago Furniture & Lumber Company.

85 My attorneys and I went down to the factory and we examined the books.

86 Q. What did Jacobs read off that he had put in?

A. He put in one thousand dollars, and Neufeld had put in less than four thousand dollars in cash. I met Jacobs up at my attorneys' office, and my attorneys and I wanted to know what was going to be done, if they
359 were going to put anything more into the plant and run the plant as they told me; they would have to do something or I would commence proceedings or something.

88 Q. You stated that you received back two thousand dollars out of the seven thousand dollars; did you get any more at any time?

A. In July—the 25th of July—I needed a thousand dollars for my Denver property, and I asked them to loan me a thousand dollars, and Jacobs said that Neufeld had drawn out two thousand dollars and I could have a thousand dollars, so he gave me a thousand dollars.

Q. Leaving four thousand dollars?

A. Leaving four thousand dollars.

Q. Now, did you ever hear Jacobs say as to whether or not he had $12,500?

A. Yes; he said in the criminal court and before Justice Foster that he never had no $12,500.

Q. Did you hear him say what he did have?

A. Yes; he said that he had forty shares of stock in the Judkins Company, he had a two-thousand-dollar note and he had fifteen hundred dollars in Lazarus Silverman's bank.

91 Q. What became of the Chicago Furniture and Lumber Company; that was the name of the corporation?

A. That went to pieces there.

Q. What do you mean by went to pieces; did they keep on doing business or stop?

A. They stopped doing business.

Q. When did they stop doing business?

A. They had almost stopped in October doing business.

Q. When did they stop entirely?

A. In——

Q. About?

A. Jacobs left there in January, 1894, and they just gradually—Mr. Neufeld gradually kept along and worked because he had a $10,000 case against me, and then the whole thing came to an end in about February or March, or probably a little longer.

92 Q. Mrs. Marks, you have stated what representations Jacobs made to you as to his financial condition and the financial condition of Neufeld. I will ask you now if you believed those statements he made to you.

A. At the time he made the statements I believed every word of them.

Q. Did you rely on those statements in giving your money to Mr. Jacobs?
A. Yes; I did.

360 Cross-examination.

By Mr. BLUM:

105 Q. You testified in the case entitled Dora Marks *vs.* The Chicago Furniture & Lumber Company in the circuit court of Delta county, Michigan?
A. In Marquette?
Q. Yes.
A. Yes.
Q. That was an action to recover the $4,000 invested in that enterprise, was it not?
A. I would like to state a great many things, but I cannot.
Q. Answer the question.
106 A. There was a suit against them, an attachment.
Q. Brought by you to recover this $4,000?
A. Yes, sir.
Q. Did you testify there?
A. Before Judge Stone.
Q. You did?
A. Yes, sir.
108 Q. And you told Jacobs, signified to him your willingness to go into it on the 10th?
A. After he had made his representations to me and said what money they had I said I would go into it.
111 Q. Mrs. Marks, you invested $4,000 in that enterprise, didn't you?
A. Yes, sir.
Q. Did you ever invest any other money in it?
A. No, sir.
Q. Did you put any other money in it for stock?
A. That is what I gave them, $5,000.
A. And got back $1,000?
A. Yes, sir.
Q. Did you ever lend that company any money, the Chicago Furniture and Lumber Company?
A. No, sir; I never loaned them any money.
113 Q. Neufeld did go down there and start that factory, didn't he?
A. Yes, sir.
Q. They employed hands and went to work?
A. Yes, sir.
Q. They organized; Neufeld was president, you vice-president, and Jacobs secretary and treasurer. Is that right?
A. Yes, sir.
126 Q. Mrs. Marks, I show you an affidavit made in the

case pending in the circuit court of Delta county, Michigan, case Dora Marks *vs.* The Chicago Furniture and Lumber Company, dated the 4th day of December, 1893, and ask you if that is your signature upon that affidavit.

A. Yes, sir.

144 361 NATHAN NEUFELD, a witness called in behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct examination by Mr. BYAM:

Q. What is your name?

A. Nathan Neufeld.

Q. Do you know the legal description of the premises you reside in?

A. I would not be quite sure, but I think I remember.

Q. Who was the owner of these premises in 1893? Were you the owner of said premises prior to the 1st day of July, 1893?

A. I was not.

145 —. Were you the owner of a factory in the city of Chicago in the month of May or June of 1893?

A. I am not quite sure; I don't think I was. I owned it just previous to that.

Q. Where was the factory you owned just previous to that?

A. At the same place.

Q. What place?

A. Northeast corner 15th and Throop streets.

Cross-examination by Mr. BLUM:

Q. Mr. Neufeld, you say you were the owner of that house, 220 South Morgan street?

A. I don't think I was at that time.

146 Q. Were you at any time the owner of that house?

A. I was.

Q. To whom did you convey it?

A. To Mrs. Neufeld, my wife.

154 Mrs. MARKS recalled.

(Examined by Mr. ATTORNEY FOR PLAINTIFF:)

Q. Mrs. Marks, that stock that you hold, is it worth anything?

155 A. I know the stock is not worth anything.

161 Plaintiff now rests in chief.

162 And thereupon the defendant, to maintain the issues on his part, introduced the following testimony—that is to say:

Insert all of pages 166, 167, 168, and 169, covering the introduction in evidence of a copy of the proceedings of the case of Dora Marks *vs.* The Chicago Furniture and Lumber Company in the circuit court of Delta county, Michigan, marked Defendant's Exhibit 3.

Also insert from beginning of page 170 to the signature "The Chicago Furniture & Lumber Co., by N. Neufeld, pres't" (being part of said proceedings).

173–174 From the words "That afterwards, to wit, on the 18th day of December, 1893, the following order was entered by said circuit court in said cause by the Hon. John W. Stone, circuit judge of said court, which order is as follows" (setting it out in full).

362 All of pages 174, 175, 176, 177, 178, and 179 relating to the same proceeding.

180 "virtue thereof be restored to the said Chicago Furniture & Lumber Company, the defendant therein.

Dated December 16th, 1893.

J. W. STONE,
Circuit Judge, 25 Circuit.

That afterwards, to wit, on the 8th day of January, 1894, there was filed in said cause the writ of attachment in said cause, together with the return of the sheriff on said writ" (relating to the same proceedings).

186–187 Declaration of the plaintiff in same proceeding.

188 Demand of defendant for a trial.

189–190 All of pages 189 and 190, containing the order of court and certificates.

191 From beginning of page up to, but not including, the words "George Gallup" (being certificate of clerk relating to the same proceedings).

240 LOUIS JACOBS, defendant, having first been duly sworn, testified in his own behalf as follows:

Direct examination by Mr. BLUM:

Q. You may state your full name.

A. Louis Jacobs.

261 Q. At that time what, if anything, interfered with the progress of the business?

A. The first thing that put a stop to the business there the sheriff came there—I think it was the sheriff—and attached the place and made a seizure of the whole place.

Q. Who brought that action?

A. Mrs. Marks.

Q. That was an action, I understand, commenced by Mrs. Marks against the Chicago Furniture and Lumber Company in Delta county, Michigan?

A. It was.

Q. What was the action brought for?

A. To recover $4,000 that she had invested in the business.

Q. The $4,000 of this suit?

A. Yes, sir.

299 Defendant rests.

And thereupon the plaintiff introduced in rebuttal the following testimony:

303 Mrs. MARKS, recalled in rebuttal, testified in her own behalf as follows:

(Examined by Mr. BYAM:)

305 Q. There is some evidence here about an order of some sort that was entered into the court up there by
363 which you dismissed your suit—their suit against you?

The COURT: She has not been asked about that. There is no oral testimony of that kind in this case?

Mr. BYAM: No, your honor.

Q. Was that result brought about by virtue of a contract which you had with the Chicago Furniture and Lumber Company?

306 The COURT: Was there any writing about a dismissal of that suit?

A. Yes; we had it in writing.

The COURT: If you have any writing, let me see it.

306–307 Plaintiff's Exhibit 11 being the settlement agreement between the Chicago Furniture & Lumber Company and Dora Marks.

307 Paper offered in evidence and marked Plaintiff's Exhibit 11. Insert said Exhibit 11, set out on the preceding page.

Q. Did you ever call on the president of that company to carry out this contract on the part of the corporation?

Objected to by counsel for defendant. Objection overruled. Exception by counsel for defendant.

Q. What did he say?

308 Objected to by counsel for defendant. Objection overruled. Exception by counsel for defendant.

A. No, sir; he never carried it out.

Q. What did he say?

Objected to by counsel for defendant. Objection overruled. Exception by counsel for defendant.

A. He said that he would not give me anything, that the stock was not worth anything, and he said he would not give me a cent for the stock.

Q. About what time did you call on him about that?

Objected to by counsel for defendant. Objection overruled. Exception by counsel for defendant.

A. July or August, 1894.

311 The foregoing was all the evidence offered or received on the trial of said cause.

And thereupon counsel for defendant again moved the court to take the case from the jury; which motion was denied by the court; to which ruling the defendant then and there excepted.

311–316 364 Instructions of the court; to be set out in full.

316 And the defendant also asks the court to give to the jury the following written instuctions:

317 16. The jury are instructed that it appears by a certified copy of the record of the judgment entered in the case of Dora Marks *vs.* The Chicago Furniture & Lumber Company in the circuit court of Delta county, Michigan, that said cause was settled between said parties; that said cause pending in said Michigan court was based upon the same cause of action on which the present suit is based, and involved the same subject-matter, and that the settlement of said cause constituted a settlement of the present cause of action.

18. You are instructed that the undisputed evidence in this case shows that in December, 1893, the plaintiff herein brought a suit in the circuit court of Delta county, Michigan, against The Chicago Furniture & Lumber Company upon the same cause of action and involved

318 the same subject-matter involved in this suit; that thereafter the parties to said suit came to a settlement thereof, and that settlement is a complete bar to the present action, and your verdict must be for the defendant herein.

21. The jury are instructed to find a verdict for the defendant herein.

But the court refused to give these instructions to the jury; to which refusal of the court to give the same and each of them to the jury the defendant, by his counsel, then and there excepted, and thereupon the jury rendered the following verdict:

We, the jury, find the defendant guilty, and assess the plaintiff's damages at $4,000.00.

319 And thereupon — a subsequent day of the term, before any judgment was rendered on the verdict, the said defendant, by his counsel, moved the court to set aside the verdict and special finding of the jury and for a new trial in said cause upon the grounds and for the reasons set forth in writing as follows:

319–320 Motion for new trial (to be set out in full).

320 But the court, after hearing the said motion for defendant to set aside the verdict of the jury and special finding of the jury and for a new trial, overruled the same;
365 to which rulings and decision of the court the defendant, by his counsel, then and there excepted.

321 The court rendered judgment upon the said verdict; to which rulings and decision of the court the defendant, by his counsel, then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record the defendant, by his counsel, tenders this his bill of exceptions and prays that the same may be signed and sealed by this court pursuant to the statute in such case made and provided, which is done accordingly this 8th day of February, A. D. 1898.

RICHARD W. CLIFFORD, [SEAL.]
Judge Circuit Court.

321–322 Appeal bond (to be set out in full).
322–323 Certificate of clerk of the circuit court (to be set out in full).
323–324 Assignment of errors in the appellate court (to be set out in full).
325 Certificate of clerk of appellate court (to be set out in full).
326 Page set out in full, being the placita of appellate court and order taking case under advisement.
327 Set out in full, being order of court reversing judgment.
328 Set out in full, being order of court allowing rehearing, etc.
328–329 Order of court affirming the judgment.
329–330 Certificate of clerk of appellate court (to be set out in full).
330–332 Assignment of errors in the supreme court of Illinois (to be set out in full).
333 Page to be set out in full, being placita supreme court.
335 Entry of appearance of Dora Marks, defendant in error (to be set out in full).
336 Order taking case under advisement (to be set out in full).
337–338 To be set out in full, containing order of affirmance of judgment.
339–341 Opinion of the supreme court of Illinois (to be set out in full).
342 Certificate of clerk supreme court of Illinois (to be set out in full).
343–345 366 Assignment of errors in the Supreme Court of the United States; to be set out in full.
348 Writ of error to the supreme court of Illinois (to be set out in full).
349 Bond (to be set out in full).

350–351 Citation from the Supreme Court of the United States to Dora Marks, to be set out in full, and affidavits thereto.

Final certificates of the clerk of the supreme court of Illinois; to be set out in full.

367 In the Supreme Court of the United States, October Term, 1900.

LOUIS JACOBS, Plaintiff in Error,
vs.
DORA MARKS, Defendant in Error.

Hon. John F. Dillon, attorney for defendant in error:

Please take notice that under paragraph nine of rule ten of said court we have sent to the clerk of said court a statement of errors on which the plaintiff in error herein relies, and have designated the parts of the record deemed necessary for the consideration thereof, a copy of which statement and parts of record is herewith served upon you and each of you.

Chicago, October 25th, 1900.

LOUIS J. BLUM,
EDGAR C. BLUM,
Attorneys for Plaintiff in Error.

I hereby accept service on behalf of the defendant in error of a copy of the foregoing papers this 25th day of October, 1900, and consent that the same, together with the additional parts of the record designated on behalf of the defendant in error herein, shall be printed by the clerk of said court and submitted to the court as the record in said cause.

JOHN F. DILLON (A. J. W.),
Attorney for Defendant in Error.

368 In the Supreme Court of the United States, October Term, 1900.

LOUIS JACOBS, Plaintiff in Error,
vs.
DORA MARKS, Defendant in Error.

To Messrs. John W. Byam, Andrew J. Hirschl, and C. L. Mahoney, attorneys in the supreme court of Illinois for the defendants in error:

You are hereby notified that under paragraph nine of rule ten of said court we have sent to the clerk of said court a statement of errors on which the plaintiff in error herein relies, and have designated the parts of the record deemed necessary for the consideration thereof, a copy of which statement and parts of record is herewith served upon you and each of you.

Chicago, October 25th, 1900.

LOUIS J. BLUM,
EDGAR C. BLUM,
Attorneys for Plaintiff in Error.

We hereby accept service on behalf of the defendant in error of a copy of the foregoing papers this 25th day of October, 1900, and consent that the same, together with the additional parts of the record designated on behalf of the defendant in error herein, shall be printed by the clerk of said court and submitted to the court as the record in said cause.

ANDREW J. HIRSCHL,
JOHN W. BYAM,
C. L. MAHONEY,
Attorneys for Defendants in Error in Supreme Court of the State of Illinois.

369 In the Supreme Court of the United States, October Term, 1900.

LOUIS JACOBS, Plaintiff in Error,
vs.
DORA MARKS, Defendant in Error.

To the Honorable James H. McKenney, clerk of said court:

Please take notice that under rule ten, paragraph nine, of said court I have, on behalf of the defendant in error herein, designated additional parts of the record deemed material for the consideration of the case, and have served on the adverse party a copy of such additional parts of record in accordance with said rule, which additional parts of record are attached to the statement of errors and parts of the record designated by the plaintiff in error herein, all together to be prepared by you as the record for the use of the court.

JOHN F. DILLON (H.),
Attorney for Defendant in Error.

370 In the Supreme Court of the United States, October Term, 1900.

LOUIS JACOBS, Plaintiff in Error,
vs.
DORA MARKS, Defendant in Error.

Additional Parts of the Record Designated by the Defendant in Error under Rule Ten of the Court.

Page
66 (In the testimony of DORA MARKS:)

Jacobs said we can get any kind and all kinds of lumber that we want to manufacture with.

Q. After that conversation where did you go? Do you recollect?

A. I went back to Neufeld's house.

Q. Any further conversations with Jacobs about that time about your moneys? If you don't recollect any, do you remember of meeting this man Gallup again?

A. Yes; on the 11th Mr. and Mrs. Jacobs and I had an ap-

pointment; we were going out to the World's fair, and Jacobs says, "Be sure and be down tomorrow morning."

Q. That was the 11th.

A. The 11th of June. So I went down to the house on the 12th of June, and I met Gallup at Neufeld's house, and Mr. Jacobs says, "Mr. Gallup was here with the corporation papers to incorporate," and I says, "Now, Mr. Gallup," I says, and to Mr. Jacobs and to Mr. Neufeld I says, "I don't know anything about business. Now, if Mr. Jacobs loses he loses his twelve thousand five hundred, Mr. Neufeld loses his twenty-five thousand, and I lose my five thousand. Are we responsible for any more?" And he says, "No; you are not responsible for any more than the sum you are going to put in," and I wanted to be sure about that, and he said that he knew if the business went against us we would not lose or be responsible for any more than we put in.

Q. This was the talk that you had in the presence of Mr. Jacobs?

A. Mr. Jacobs and Mr. Neufeld.

Q. What further was done there?

A. We signed the corporation papers there.

Q. I will ask you if you knew that Gallup was to come down from Escanaba with papers.

A. No, sir.

Q. Was there any talk between you and Gallup that he was to be down here on the 12th or any time?

A. No, sir.

Page

67 Q. Is that the paper that was signed?

A. (After examining paper.) Yes, sir.

371 Paper introduced in evidence and marked "Plaintiff's Exhibit 1." Said Exhibit 1 is set out on the following pages. Insert Exhibit 1 in full.

Q. What happened after that? This was on the 12th.

A. After that we went along as usual. We met every day, and we visited the mother, and we went to the World's fair, and on the 17th I was down to Neufeld's house, and Mr. Jacobs says, "Now we have to get our money."

Q. That was on the 17th?

A. Yes, sir.

A. (Continuing:) "Now, Neufeld is going up to Escanaba tonight, and we want your money." "Well," I says, "have you got your money?" and they said, "Yes." Jacobs says, "I have my money here and Neufeld has his money."

Q. What did they do?

69 A. They showed me three papers.

Q. Who showed them to you?

A. Mr. Jacobs and Mr. Neufeld showed me three papers. They says, "Here is three papers," and the white paper was

Jacobs' paper. This money and that paper looked exactly like my certificates, and Mr. Neufeld's was two light-blue papers.

70 Q. Is that the certificate?

A. Yes, sir.

Q. Like that?

A. Yes. Jacobs' looked just like that. He held it up, and says, "Here is my money."

Q. What did Neufeld do?

A. He showed me his papers.

Q. What color were his papers?

A. A light blue.

167 Q. At the time you went out of that business you say that stock had no value?

A. Yes, sir.

Q. Do you know whether or not the company had any assets on hand at that time, no property of any kind—the Chicago Furniture & Lumber Company?

A. They had some machinery, but Neufeld sold all that machinery.

Q. When?

A. He sold that in July or August.

Q. Of what year?

A. 1893.

Q. 1893?

A. 1894.

Q. When did you go away from Escanaba?

A. I went away from Escanaba in July, 1894.

Q. Do you mean to say that Neufeld sold his interest in the Chicago Furniture & Lumber Company to Benedict Wolf?

—. ——.

A. Wolf took Jacobs' place?

A. Yes.

Q. Isn't it a fact that at the time you made the levy, when you got out the writ of attachment and the sheriff made his levy, that the company had on hand some machinery and lumber which was appraised at about $8,000.00?

A. $7,000 or $8,000, but they owed for it.

372 Q. Do you know what other property they had on hand at that time?

A. They didn't have any other.

Q. Do you know whether or not they had any book accounts outstanding?

A. Well, I know that the Wolf Lumber Company made an attachment.

The COURT: Did they have any persons owing them? Do you know of any persons owing the company?

A. I don't know of any.

Q. Do you know who were the stockholders at that time of the Chicago Furniture & Lumber Company?

A. At that time?

Q. At the time you got out the attachment?

158 A. Neufeld, Jacobs, and myself.
Q. You were the only ones?
A. Yes; the three of us.
Q. You say that Neufeld had not at that time paid up the full amount of his stock subscription.
A. No, sir.
Q. He was indebted to the company, was he not, for the balance of the stock subscription?
A. Yes, sir.

Redirect examination by Mr. BYAM:

Q. Do you know whether or not there were any judgments against the company at that time?

Objected to by counsel for defendant as incompetent.
The COURT: She may tell if she knows.
Exception by counsel for defendant.

A. The company owed the Wolf Lumber Company, and they owed in Escanaba for repairing some of the machines, and they owed for these that I know of, for these two machines they got; they owed for them, and they owed the working hands.

Mr. BLUM:

Q. Were not these two machines paid for?
A. I don't know. When we made the attachment I know they took them out and sold them.
Mr. BYAM: Who did?
A. Neufeld and Jacobs.
Mr. BLUM: That is all you know about it?
A. Yes.
Mr. BYAM: What did Jacobs say?
A. Jacobs says Neufeld had the impudence to take out while the attachment was had; the sheriff was not under bond, and Jacobs and Neufeld went into the factory and took out two large machines and sold folding beds to private individuals and got $10 and $20 apiece for some of the folding beds and
159 put the money into his pocket.
373 Q. Who put the money in his pocket?
A. Jacobs and Neufeld together.
Q. When you say that Jacobs and Neufeld had the impudence what do you mean by that?
A. He said he had the impudence to take the machines out and he didn't have any right to do it. He said he had the impudence to take the machines out of the factory.
Q. What was done with the machines?
A. He sold them.
Q. Who sold them?
A. Jacobs and Neufeld.
Q. How do you know?

A. Jacobs said so. Jacobs was laughing over it, to think the sheriff had made an attachment and to think that the law was such in Michigan, after the sheriff made the attachment, that they could go into the factory and take these things out.

Q. Do you know how much that company owed?

A. I don't know how much they owed altogether.

Q. About how much?

A. $5,000 they said they owed.

The COURT: Who said that?

A. Jacobs.

Mr. BLUM: To whom did he say that?

A. To me and some more people in the Luddington hotel.

Q. When did Jacobs say that to you?

A. They were talking it over about the concern and he says, Well, he says, this is a great thing, and some of the gentlemen——

Mr. BLUM: I am asking you when.

374 In the Supreme Court of the United States, October Term, 1900.

LOUIS JACOBS, Plaintiff in Error,
vs.
DORA MARKS, Defendant in Error.

* * * * * * *

Louis J. Blum and Edgar C. Blum, attorneys for plaintiff in error:

You are hereby notified that, in accordance with rule ten of said court, I have prepared a statement of the additional parts of the record deemed necessary by the defendant in error for the consideration of the case by the court, which I herewith send you, to be sent by you to the clerk of said court, and which, together with the statement of errors prepared by you and designation of the parts of the record in support thereof, shall be printed by said clerk for the use of the court.

JOHN F. DILLON (H.),
Attorney for Defendant in Error.

We hereby acknowledge receipt of the statement of the additional parts of the record above referred to, and agree to send the same, together with the statement of errors relied on by plaintiff in error herein and the parts of the record deemed necessary for the consideration thereof, to the clerk of said court to make up the record in accordance with the rules of court.

LOUIS J. BLUM,
EDGAR C. BLUM,
Attorneys for Plaintiff in Error.

374½ [Endorsed:] Supreme Court of the United States, October term, 1900. Louis Jacobs, plaintiff in error, *vs.* Dora Marks, defendant in error. Errors relied upon and parts of record deemed necessary. Blum & Blum, attorneys and counsellors at law, Chicago.

375 [Endorsed:] File No., 17,895. Supreme Court U. S., October term, 1900. Term No., 410. Louis Jacobs, pl'ff in error, *vs.* Dora Marks. Statement of errors and designation by both pl'ff in error and def't in error of parts of record to be printed, and notice. Filed Oct. 27, 1900.

Endorsed on cover: File No., 17,895. Illinois supreme court. Term No., 410. Louis Jacobs, plaintiff in error, *vs.* Dora Marks. Filed September 1st, 1900.

No. 410.

Brf. of Blum & Blum for Pl'ff

Office Supreme Court U. S.
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DEC 20 1900
JAMES H. McKENNEY,
Clerk.

Filed Dec. 20, 1900.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

No. 410.

LOUIS JACOBS, *Plaintiff in Error,* vs. DORA MARKS, *Defendant in Error.*	Writ of Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR

AND

OPINIONS OF STATE COURTS.

LOUIS J. BLUM,
EDGAR C. BLUM,
ATTORNEYS FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

LOUIS JACOBS,
Plaintiff in Error,
vs.
DORA MARKS,
Defendant in Error.

Writ of Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT.

STATEMENT OF CASE.

In the declaration filed in the Circuit Court of Cook County, Illinois, by the defendant in error in this case, she sets forth that by means of false representations, the plaintiff in error induced her to become a member of a corporation known as the Chicago Furniture & Lumber Company, and to invest $5,000 in its stock; that the corporation had ceased doing business, her stock had become worthless and her money lost. Having at one time received back $1,000 from the corporation, her claim, according to her testimony, is for $4,000.

By pleas in bar, the plaintiff in error set up that the same claimant, Dora Marks, had theretofore instituted an action in the Circuit Court of Delta County, Michigan, against the Chicago Furniture & Lumber Company for the recovery of the same $4,000; that the court had jurisdiction of the parties and the subject-matter; that the parties had made a settlement, and pursuant thereto the court had

entered a judgment in these words: "This cause having been settled, it is hereby discontinued by consent of both parties without cost to either party." And that she had, therefore, received full satisfaction of the claim upon which the present suit is based.

Upon the trial, the plaintiff in error introduced, and the court received in evidence, a copy, exemplified in accordance with the act of Congress, of the proceedings in the Michigan case, including the judgment. Both of the parties to this cause testified that the two suits involved the same subject-matter.

The defendant in error thereupon introduced in evidence a written agreement, upon which the order of the Michigan court was based and which is as follows:

> Articles of agreement made and entered into this 14th day of July, A. D. 1894, by and between the Chicago Furniture & Lumber Co., a corporation, of the City of Escanaba, Delta County, Michigan, parties of the first part, and Dora Marks, of Denver, Colorado, party of the second part. Party of the first part agrees to purchase $20,000 (twenty thousand dollars) worth of stock of the Chicago Furniture & Lumber Company which the party of the second part holds for the sum of $4,000 to be paid as follows: $1,000 to Mead and Jennings, attorneys for said party of the second part, as soon as the parties of the first part dispose of their stock to the amount of a thousand dollars or interest other capital in said company to the amount of a thousand dollars; and $3,000 to said party of the second part on the day that the plant now occupied by the parties of the first part in said City of Escanaba is turned over to them and a clear title to the property earned by them. Parties of the first part further agree to discontinue the damage suit now pending against the party of the second part without cost. Said parties of the first part further agree to release said party of the second part from all liability of said second party

for the balance due on unpaid stock. Party of the second part agrees to sell her said stock of $20,000 to the parties of the first part and accept payment as aforesaid mentioned. Party of the second part also agrees to discontinue the suit now pending under attachment proceedings against party of the first part without cost. Said stock to be transferred as paid for. In witness whereof the parties have hereunto set their hands and seals the day and year first above written. (Signed) Chicago Furniture & Lumber Company, per N. Neufeld, president; B. Wolf, secretary; Dora Marks.

Notwithstanding the objections of plaintiff in error, the defendant in error was then allowed to testify that in July or August, 1894, she had called upon the president of the corporation to carry out this agreement. She says: "He never carried it out. He said he would not give me anything; that the stock was not worth anything, and he said he would not give me a cent for the stock."

The plaintiff in error requested the court to instruct the jury that the settlement set forth by the Michigan jury constitutes a bar to this action. These instructions, which are set out in the specification of errors relied upon, were refused by the court.

The jury rendered a verdict for $4,000, and the plaintiff in error entered a motion for a new trial. One of the grounds set up in that motion is: "The verdict and the action of the court fail to give full faith and credit to the judgment of the Circuit Court of Delta County, Michigan, in the case of DORA MARKS v. THE CHICAGO FURNITURE & LUMBER COMPANY, contrary to article 4, section 1 of the constitution of the United States, which provides: Full faith and credit shall be given in every state to the public acts, records and judicial proceedings of every other state."

This motion having been overruled, the court rendered a judgment, which, on appeal, was first reversed, then, on rehearing, affirmed by the Appellate Court of Illinois, and again affirmed by the Supreme Court of Illinois. In each of these courts, the rights of the plaintiff in error, under the Federal Constitution, were expressly set up and claimed.

Errors Relied Upon.

1. The court below erred in failing to give full faith and credit to the judicial record and proceedings of the Circuit Court of Delta County, State of Michigan, in the case of Dora Marks v. The Chicago Furniture & Lumber Company, which records and proceedings included the following order of court: "This cause having been settled, it is hereby discontinued by consent of both parties," which said suit, as shown by the evidence in this cause, involved the same subject-matter involved in the present suit, and which said judicial records and proceedings were duly pleaded in bar herein by the plaintiff in error and introduced in evidence on the trial of this cause. And in failing to hold that said judgment, record and proceedings of the Michigan court constituted a bar to the present action, the courts below failed to give full faith and credit to the record and judicial proceedings of the said Circuit Court of Delta County, Michigan, contrary to article 4 of the Constitution of the United States, which provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

2. The Supreme Court of Illinois erred in failing to reverse said judgment by reason of the failure of the courts below to give full faith and credit to said judicial records and proceedings of the Circuit Court of Delta County, Michigan, as required by said article 4 of the Constitution of the United States.

3. The Supreme Court of Illinois erred in failing to reverse said judgment by reason of the refusal of the Circuit Court of Cook County to give the following instruction asked by the plaintiff in error: "16. The jury are instructed that it appears by a certified copy of the record of the judgment entered in the case of DORA MARKS v. THE CHICAGO FURNITURE & LUMBER COMPANY in the Circuit Court of Delta County, Michigan, that said cause was settled between said parties; that said cause pending in said Michigan court was based upon the same cause of action on which the present suit is based, and involved the same subject-matter, and that the settlement of said cause constituted a settlement of the present cause of action." By this refusal the said Circuit Court failed to give full faith and credit to the judicial records and proceedings of the said Circuit Court of Delta County, Michigan.

4. The court below erred in failing to reverse said judgment by reason of the refusal of the Circuit Court of Cook County to give the following instruction asked by the plaintiff in error:

"18. You are instructed that the undisputed evidence in this case shows that in December, 1893, the plaintiff herein brought a suit in the Circuit Court of Delta County, Michigan, against the Chicago Furniture & Lumber Company upon the same cause of action and

involved the same subject-matter involved in this suit. That thereafter the parties to said suit came to a settlement thereof, and that settlement is a complete bar to the present action and your verdict must be for the defendant herein." By this refusal, the said Circuit Court failed to give full faith and credit to the judicial records and proceedings of the said Circuit Court of Delta County, Michigan, in evidence in this cause.

5. The court below erred in failing to reverse said judgment by reason of the refusal of the Circuit Court of Cook County to give the following instruction asked by plaintiff in error:

"21. The jury are instructed to find a verdict for the defendant herein." By this refusal the said Circuit Court failed to give full faith and credit to the judicial records and proceedings of the said Circuit Court of Delta County, Michigan, in evidence in this cause.

6. The Supreme Court of Illinois erred in not reversing said judgment by reason of error of the Circuit Court in denying the motion of plaintiff in error to set aside the verdict and grant a new trial herein on the grounds specified in said motion for new trial that "the verdict and the action of the court fail to give full faith and credit to the judgment of the Circuit Court of Delta County, Michigan, in the case of DORA MARKS v. THE CHICAGO FURNITURE & LUMBER COMPANY, contrary to Art. 4, Sec. 1, of the Constitution of the United States, which provides: "Full faith and credit shall be given in every state to the public acts, records and judicial proceedings of every other state."

7. The judgment of the courts below failed to give full faith and credit to the judicial records and proceed-

ings of the Circuit Court of Delta County, Michigan, in said case of DORA MARKS v. THE CHICAGO FURNITURE & LUMBER COMPANY, and thus deprived the plaintiff in error of his rights and privileges under said article 4 of the Constitution of the United States.

BRIEF OF PLAINTIFF IN ERORR.

The plaintiff in error most respectfully submits for the consideration of the Court these propositions:

This Court has jurisdiction of a case presenting the question whether or no a judgment rendered in one state has received full faith and credit in the courts of another state.

HUNTINGTON v. ATTRILL, 146 U. S., 657.
CARPENTER v. STRANGE, 141 U. S., 87.
GREEN v. VAN BUSKIRK, 72 U. S., 307.
CRAPO v. KELLY, 16 Wall., 610.
DUPASSEUR v. ROCHEREAU, 21 Wall., 130.

A refusal to give due effect to such judgment denies to the party claiming under it a right secured to him by the Federal Constitution and laws.

HUNTINGTON v. ATTRILL, *supra.*
LAING v. RIGNEY, 160 U. S., 531.

This clause of the constitution requires not merely that such records be received in evidence, but that they be given effect.

CRAPO v. KELLY, *supra.*
CARPENTER v. STRANGE, *supra.*
LAING v. RIGNEY, *supra.*

The judgment of the Michigan court is a final judgment, not a mere non-suit.

U. S. v. PARKER, 120 U. S., 96.

BANK OF COMMONWEALTH v. HOPKINS, 2 Dana, 395.

MERRITT v. CAMPBELL, 47 Cal., 542.

HUBBELL v. U. S., 171 U. S., 209.

The Michigan judgment is not open to doubt nor contradiction in the courts of Illinois, but must be accepted by them as conclusive.

HUNTINGTON v. ATTRILL, *supra.*

SOUTHERN PAC. R. R. v. U. S., 168 U. S., 50.

LAST CHANCE MINING CO. v. TYLER MINING CO., 157 U. S., 683.

NEW ORLEANS v. CIT. BANK, 167 U. S., 371.

MASON LUMBER CO. v. BUCHTEL, 101 U. S., 639.

HOPKINS v. LEE, 19 U. S., 109.

2 STORY ON CONSTITUTION, Section 1310.

BIGELOW ON ESTOPPEL, 3rd Ed., 219-209.

2 BLACK ON JUDGMENTS, Sec. 625.

LAING v. RIGNEY, *supra.*

VOORHEES v. JACKSON, 10 Pet., 474.

MILLS v. DURYEA, 7 Cranch, 45.

CHRISTMAS v. RUSSELL, 5 Wall., 290.

NORTON v. HOUSE, Vol. 101, No. 3, Advance Sheets, Nat. Rep. System.

DUNLAP v. VOORHEES, 110 Mich., 109.

MUTUAL FIRE INS. CO. v. PHOENIX INS. CO., 105 Mich., 571.

DICKINS v. HAYES, 31 Conn., 417.

JACOBSON v. MILLER, 41 Mich., 98.

RAE v. HURLBURT, 17 Ill., 577.

The Michigan judgment affords record evidence of the fact that the subject-matter of the litigation in that court had been adjusted, and should have been given the same effect in Illinois that would be given it in Michigan, and no evidence is necessary or proper to prove the effect of the judgment in Michigan. It can have but one definite, inevitable effect anywhere, if its statement of fact is believed. All authorities, including the English and law dictionaries, agree as to the definition of the word "settled." Used in this sense, it means paid, and the statement that the case was settled or the claim paid, whether correct or erroneous, is conclusive, and not subject to review nor contradiction in the courts of other states.

(Authorities last cited.)

In no case wherein the meaning of the judgment or decree is obvious, as where the decree is a mere finding of facts, is proof of effect in the state wherein rendered, introduced or required. In the following cases the judgments and decrees have been given effect as a matter of course, without such proof:

REYNOLDS v. STOCKTON, 140 U. S., 254.
EMBRY v. PALMER, 17 Otto, 3.
CHRISTMAS v. RUSSEL, *supra*,
GREEN v. VAN BUSKIRK, *supra*.
MILLS v. DURYEA, 7 Cranch, 45.
SWEET v. BRACKLEY, 53 Me., 346.
ROGER v. ROGER, 15 B. Monroe, 375.
DESTREHAM v. SCUDDER, 11 Mo., 313.
HASSELL v. HAMILTON, 33 Ala., 283.
RAE v. HURLBUT, 17 Ill., 577.
LOWE v. MUSSEY, 41 Vt., 393.

The evidence of the defendant in error on the question of satisfaction was improperly admitted, but it does not

affect this case, as it in no way contradicts the recital in the record that a settlement was in fact made. It relates merely to the question whether or not the new agreement was performed, a question beyond the scope of the present inquiry.

In some cases a new agreement in itself affords satisfaction. In others, satisfaction is had only by its performance. In the former class of cases the remedy is upon the new promise.

SIMMONS v. CLARK, 56 Ill., 96.

BANK OF COMMONWEALTH v. HOPKINS, 2 Dana, 395.

CUMBER v. WANE, SMITH'S LEAD COS., 146.

In this case, the agreement itself and not its performance was relied upon. The defendant in error so construed the agreement, as is evidenced by the fact that two weeks after it was made, she caused her suit to be dismissed.

Moreover, she did receive satisfaction under the new agreement. She obtained a release, so far as the corporation is concerned, of the liability for the amount still due on her stock subscription. She obtained, or secured the right to obtain, a dismissal of the damage suit against her, and as the defendant in the Michigan case, by the terms of the order, was compelled to pay his own costs incurred before the dismissal of her suit against it, to that extent, there was a recovery by her and a judgment against it.

MERRITT v. CAMPBELL, 47 Cal., 546.

Moreover, the fact that she received nothing for the stock does not prove, as the courts below found, that she had not received satisfaction, as the new agreement did not diminish her rights in this regard. On the contrary, it increased them, for, while the Michigan court, before

the settlement, had held the corporation not liable in the action—as appears from its opinion in evidence herein—and had dissolved her attachment, by this new agreement a liability was assumed by the corporation to her, and she was thereby given a possible right of action which before she had not possessed.

When a plaintiff receives satisfaction, regardless of its source, his claim upon the same subject-matter is barred as against the world.

LOVEJOY v. MURRAY, 3 Wall., 1.

Although the corporation may not have been liable in the Michigan case, yet a release to it is a release to all against whom the claim is asserted.

LEDDY v. BARNEY, 139 Mass., 397.
BROWN v. MARSH, 7 Vt. 320.
HOPKINSON v. SHELDON, 37 Ala., 311.
LIVINGSTON v. BISHOP, 1 Johns., 290.
GUNTHER v. LEE, 45 Md., 60.

The fact that a settlement had been made appearing by unimpeachable record evidence, and the identity of the subject-matter of the two cases having been admitted, the plea of satisfaction presented no issue of contested fact for the determination of the jury, but presented only a question of law for the judgment of the court, and the court should, therefore, have given the instructions quoted in the specification of errors, holding the defense of satisfaction established by undisputed evidence and directing a verdict for the defendant.

Respectfully submitted.

LOUIS J. BLUM,
EDGAR C. BLUM,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

Louis Jacobs, *Plaintiff in Error,*
vs.
Dora Marks, *Defendant in Error.*

ARGUMENT OF PLAINTIFF IN ERROR.

The jurisdiction of this Court is properly invoked when the question presented is whether or no the courts of one state have accorded full faith and credit to a judgment of a court of another state.

HUNTINGTON v. ATTRILL, 146 U. S., 657.
CARPENTER v. STRANGE, 141 U. S., 87.
GREEN v. VAN BUSKIRK, 72 U. S., 307.
CRAPO v. KELLY, 16 Wall., 610.
DUPASSEUR v. ROCHEREAU, 21 Wall., 130.

Article 4 of the Constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." The act of Congress, passed in pursuance of this article, provides: "And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

Under the constitutional provision and law quoted, the judgments of a state are entitled in the courts of another state to the credit and effect which they receive in the state in which they are rendered, and a refusal to give them "the force and effect in this respect which they had in the state in which they were rendered, denies to the party a right secured to him by the constitution and laws of the United States."

HUNTINGTON v. ATTRILL, *supra.*
LAING v. RIGNEY, 160 U. S., 530.

CONCLUSIVENESS OF THE MICHIGAN JUDGMENT.

The defendant in error had instituted, in the Circuit Court of Delta County, Michigan, a suit based upon the subject-matter involved in this suit. The judgment in that case, entered in pursuance of the agreement of the parties, recites: "This cause having been settled, it is hereby discontinued by consent of both parties, without cost to either party."

We respectfully submit that this recital, whether correct or erroneous, was conclusive upon the courts of Illinois, and that these courts were precluded from inquiring into the facts and circumstances relating to the settlement. Judgments import absolute verity and cannot be contradicted.

"The errors of the court do not impair their validity, binding till reversed, any objection to their full effect must go to the authority under which they have been conducted. * * * It is a record importing absolute verity."

VOORHEES v. JACKSON, 10 Pet., 475.

When duly pleaded and proved in a court of another state, "they have the effect of being not merely *prima facie* evidence, but conclusive proof of the rights thereby adjudicated."

HUNTINGTON v. ATTRILL, *supra.*

"The framers of the constitution intended to give not only faith and credit to the public acts, records and judicial proceedings of each of the states, such as belonged to those of all foreign nations and tribunals, but to give to them *full* faith and credit; that is, to attribute to them positive and absolute verity so that they cannot be contradicted or the truth of them be denied, any more than in the state where they originated."

2 STORY ON THE CONSTITUTION, Sec. 1310:

"Nor can error of fact be set up against the judgment."

BIGELOW ON ESTOPPEL, 3rd Ed., P. 219:

"Such judgments are to be regarded as record evidence throughout the Union." id. pp. 226-209.

"It is very necessary to be borne in mind in connection with the rules just stated that the averments or disclosures of the record in respect to the matters decided cannot be controverted by any extraneous evidence. They may be explained when ambiguous. They may be made specific when generally expressed, but they cannot be contradicted."

2 BLACK ON JUDGMENTS, Sec. 625.

"The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction when collaterally questioned is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular and irreversible for error."

LAING v. RINGLEY, *supra.*

MILLS v. DURYEA, 7 Cranch, 45.

MASON LUMBER CO. v. BUCHTEL, 101 U. S., 638.

SOUTHERN PAC. R. R. v. U. S., 168 U. S., 50.

LAST CHANCE MINING CO. v. TYLER U. CO., 157 U. S., 683.

NEW ORLEANS v. CITIZENS BANK, 167 U. S., 371.

CHRISTMAS v. RUSSELL, 5 Wall., 290.

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DICKINS v. HAYES, 31 Conn., 417.

JACOBSON v. MILLER, 41 Mich., 198.

RAE v. HURLBUT, 17 Ill., 577.

EFFECT OF MICHIGAN JUDGMENT.

The courts of a state being required by the Federal Constitution and laws to give to the judgment of the court of another state the effect that it would have in the courts of the latter state, the question arises, how is that effect to be determined? By evidence, where a judgment is susceptible of a variety of constructions and its legal effect is doubtful; without evidence, when the words are clear and leave no room for doubt or misconstruction, as when the judgment contains a mere recital of facts. In a case like the one now before the Court, no evidence has ever been adduced or required. That part of the judgment which relates to the settlement is a mere recital of fact, whose meaning is determined by the presumption that words employed by a court are designed to convey

the meaning which common usage gives them. The judgment says that the case was settled, and the lexicographers agree as to the definition of that term, employed in this connection.

> "Settle: To bring to a conclusion (that which has been in dispute or uncertainty); decided; determined, as to *settle* a difference; to *settle* a contest." —Standard Dictionary.
>
> "Settled: Arranged or adjusted by agreement, payment or otherwise, as a *settled* account."—Century Dictionary.

The Michigan judgment is, therefore, self-explanatory, as much so as if it recited that the claim had been paid, and no less so than is the ordinary chancery decree containing a recital of facts or a judgment at law in dollars and cents. In such cases no proof has ever been required as to the effect of such judgment or decree in the state in which it had been rendered, and the necessity for such proof has never even been suggested by counsel or considered by the courts.

REYNOLDS v. STOCKTON, 140 U. S., 254.
EMBRY v. PALMER, 17 Otto, 3.
CHRISTMAS v. RUSSELL, *supra.*
GREEN v. VAN BUSKIRK, *supra.*
MILLS v. DURYEA, 7 Cranch., 45.
SWEET v. BRACKLEY, 53 Me., 346.
ROGER v. ROGER, 15 B. Monroe, 375.
DESTREHAM v. SCUDDER, 11 Mo., 313.
HASSELL v. HAMILTON, 33 Ala., 283.
RAE v. HURLBUT, 17 Ill., 577.
LOWE v. MUSSEY, 41 Vt., 393.

The case of LAING v. RIGNEY, *supra,* furnishes an excellent illustration of the nature of proceedings requiring proof as well as those requiring none. That action

was brought in a New York court to enforce a New Jersey decree, based on a supplemental bill of which no personal service was had, and evidence was introduced to prove what effect would be given to these proceedings in the courts of New Jersey. But no proof was offered as to the meaning or effect of the facts found by the decree or relief granted, and obviously none was necessary, for the court, reversing the New York court, compelled the enforcement of the decree without any such evidence.

Retraxit and Non-suit.

The Supreme Court of Illinois, in its opinion, says:

> "The effect of the transaction between the plaintiff and the furniture and lumber company was a mere dismissal of her action, or an abandonment of her action as against the furniture and lumber company, for which she recovered nothing in return."

With due respect for that court, we shall endeavor to demonstrate, firstly, that it erred in its construction of the law; and, secondly, that it misapprehended the facts —based on undisputed evidence—applicable to the case.

The question of law involved has been expressly decided by this Court in a case perfectly analogous in the point here involved to the present case. The action arose upon a claim against the United States. The defense set up was an order entered in a former suit for the same claim in these words:

> "Whereupon, in open court, on motion of defendant's attorney, the district attorney, representing the United States, consenting thereto, the following judgment was duly made and entered, to wit: 'Upon motion of Ellis & King, attorneys for defendants, and it appearing to the court that the subject-matter in this suit has been adjusted and settled by the

proper parties in Washington, it is, therefore, ordered that this cause be, and the same is hereby, dismissed."

In determining the effect of this order the Court says:

"The second question is whether the judgment rendered in the first action was final. It is claimed to be equivalent only to a nonsuit, and, therefore, not *res judicata*. A judgment of nonsuit, whether rendered because of the failure of the plaintiff to appear and prosecute his action or because upon the trial he fails to prove the particulars necessary to make good his action, or when rendered by consent upon an agreed statement of facts, is not conclusive as an estoppel, because it does not determine the rights of the parties. HOMER v. BROWN, 57 U. S. (16 How.), 354; HALDEMAN v. U. S., 91 U. S., 584; MANHATTAN LIFE INS. CO. v. BROUGHTON, 109 U. S., 121. But a nonsuit is to be distinguished from a *retraxit*. MINOR v. MECHANICS BANK, 26 U. S., 1 Pet., 46. Blackstone defines the difference as follows: 'A *retraxit* differs from a nonsuit in this: one is negative and the other positive. The nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open voluntary renunciation of his claim in court, and by this he forever loses his action.' 3 Bl. Com., 296. And it has been held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action. BANK OF COMMONWEALTH v. HOPKINS, 2 Dana, 395; MERRITT v. CAMPBELL, 47 Cal., 542. It is clearly so when, as here, the judgment recites that the subject-matter of the suit had been adjusted and settled by the parties. This is equivalent to a

> judgment that the plaintiff had no cause of action, because the defense of the defendant was found to be sufficient in law and true in fact. Upon general principles of the common law, regulating the practice and procedure of courts of justice, it must be held that the judgment here in question was rendered upon the merits of the case, is final in its form and nature, and must have the effect of a bar to the present action upon the same cause."
>
> U. S. v. PARKER, 120 U. S., 96.

In the case of BANK OF COMMONWEALTH v. HOPKINS, cited by the Court in the Parker case, the language of the order in question was: "Dismissed agreed." The Supreme Court of Kentucky says:

> "It has been frequently decided by this court that the legal deduction from a judgment dismissing a suit 'agreed' is that the parties had by their agreement adjusted the subject-matter of controversy in that suit."

In MERRITT v. CAMPBELL, also cited by the Court in the Parker case, the judgment under construction contained this recital:

> "Whereupon, by agreement of counsel for the respective parties, it is ordered by the court that this cause be dismissed, each party paying his own costs."

We believe that we are not departing from conservative ground when we assert that neither in the Federal nor State reports can one find a single case sustaining the position of the Illinois court in the language quoted. We do not mean to say that all cases go so far as the California court in MERRITT v. CAMPBELL in holding that an order of dismissal based on the agreement of the parties in itself constitutes a bar. But we have been able to find no case opposing the doctrine that where the judgment itself recites a settlement of the cause, that judgment be-

yond doubt constitutes a bar to another action. It must be so, for if the subject-matter of the suit has been adjusted, there is nothing left to litigate, and of the fact that it has been adjusted no better evidence can be adduced than record evidence, created by the parties in interest themselves.

There is another point of view from which this order may be considered. For the purpose of illustration, let us assume, for the moment, that, under the order of dismissal, the defendant in error did not enter a *retraxit*, but took a nonsuit, how would that construction impair the value of that part of the order which recites that the cause had been settled? Whatever may be the signification of the latter part of the judgment, dismissing the suit, the former part, finding the settlement, retains the same clear and inflexible meaning.

A settlement may, moreover, be made without any order of court or dismissal of the suit in any form, and would, if established, be effectual as a bar. The recital that the case had been settled would therefore be sufficient to meet our requirements in this case, if the rest of the order were eliminated.

If it is true that a settlement made without any order of court will, if established by proof, defeat another action based on the same subject-matter, what is the purpose of procuring an order of court reciting the settlement? Manifestly, there can be but one—to invest the transaction with the sanctity attached to a judicial act, and, by securing the record evidence of a court, instead of relying upon the mutable impressions of witnesses, to place it forever beyond dispute.

UNDISPUTED ISSUES OF FACT AND EFFECT THEREOF.

The Supreme Court of Illinois based its finding that no satisfaction had been received by the defendant in error on her oral evidence to the effect that she had received nothing for the stock. Under what rule of law this evidence was competent we have never been able to discover; but the exception taken at the time to its admission is not specifically assigned as error for the reason that the oral evidence is not important in the least. It in no way contradicts the recital in the Michigan judgment that the cause had been settled, nor does the defendant in error pretend that the entry of the judgment was procured by fraud nor that she failed to give her assent to it, nor that she was prevailed upon to settle by means of fraudulent inducements. All that she claims is that she received no money for her stock, and from this evidence the State Supreme Court concluded that "she received nothing in return."

It was this conclusion to which we had reference when we said that the court below misapprehended the facts relating to this branch of the case. The defendant in error did receive something in return. The satisfaction which she undoubtedly received was the dismissal, or right to procure the dismissal on her motion, of the damage suit pending against her; her release, so far as the corporation could release her, from liability on her stock subscription; and the agreement of the defendant in that suit to pay its own costs incurred up to that time—the judgment providing for a dismissal without cost to either party. That the last item mentioned of itself affords satisfaction is decided by the Supreme Court of Cali-

fornia. In that case the judgment, like this one, recited that the suit was dismissed by agreement, each party to pay his own costs. The court says:

> "In the case at bar there was not only a mutual agreement that the action be dismissed by the judgment of the court rendered pursuant to the agreement, but the defendant was by the terms of the agreement of this dismissal adjudged to pay the costs which, except for the agreement and the judgment by which it was carried into effect, he was not bound to pay, but might have otherwise recovered against the plaintiff. These costs he had paid before the commencement of the present action, and to that extent the plaintiff may be said to have obtained a recovery against the defendant in the action."
>
> MERRITT v. CAMPBELL, *supra.*

It may be said that, although in these other particulars, she received satisfaction, yet she failed in the most important respect, as she obtained no money. But in what way did the settlement injure her in that regard? By that settlement she lost no rights which she had theretofore possessed. On the contrary, her rights were increased, for, while the Michigan court had already held against her right of action—upon the grounds stated in its opinion in evidence in this case—by this new agreement the corporation assumed, or tried to assume, a liability such as she had vainly sought to enforce, and an action for the money could be instituted by her whenever the conditions provided in the agreement would exist. It thus appears that, however little she may have received under the new agreement, it was certainly in excess of what she paid for it.

But, conceding for the immediate purpose that the agreement of settlement was in no respect performed, that would not invalidate nor set aside the judgment of the

court. Nothing that the parties to that suit could do or leave undone would affect that order. The remedy of the defendant in error for a non-performance of the new agreement was upon that agreement.

> "The distinction seems to be that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there shall be no satisfaction without performance."
>
> SIMMONS v. CLARK, 56 Ill., 101.
>
> CUMBER v. WANE, Smith's Lead. Cas., 146.

> "If in such a case the original cause of action has not been actually extinguished by payment or other actual satisfaction, but was only transformed by the agreement of the parties into a new cause of action, the remedy must be on the latter and cannot be maintained on the former and extinguished cause of action."
>
> BANK OF COMMONWEALTH v. HOPKINS, 2 Dana, 395.

In this case the agreement itself and not its performance was received in satisfaction. That is the construction which the defendant in error herself placed upon the agreement, as is conclusively demonstrated by the fact that two weeks after the date of the agreement, without waiting for its performance, she procured the entry of the order by which her suit was dismissed.

The agreement contains no reservation, and, if it did, that would not be sufficient to limit the effect of the order, but the restriction would also have to be "contained in the order itself," according to the Parker case. If the settlement was in any way dependent upon future performance and failed by reason of a non-compliance with the conditions, the error of the Michigan court in finding an abso-

lute settlement should have been called to its attention in order that the necessary correction could be made. But this was not done, and the courts of another sovereignty now undertake to review that judgment and change it from an absolute to a conditional order, on the grounds that it does not truly recite the facts upon which it was based, and should not, upon the facts as found by the reviewing tribunals, have been a final order. The Supreme Court of Illinois undertakes in a collateral proceeding to rectify an error of the Michigan Circuit Court, over whose acts it has no supervisory control—an error which even in a direct proceeding could not have been corrected by the Supreme Court of Michigan, notwithstanding its appellate jurisdiction, inasmuch as the error had not been called to the attention of the trial court.

There is in the Illinois reports a record of another attempt on the part of a litigant to submit to the Illinois Supreme Court the right to dispute a judgment of a sister state, but that attempt was not equally successful. That was a case brought upon a judgment rendered by the Supreme Court of New York, and the defendant set up in his plea that the plaintiff, having, by means of a pretended settlement, procured the absence of the defendant, secured a judgment against the latter in his absence. It was not shown that the defendant had called these facts to the attention of the New York Supreme Court. The court, after discussing the effect of the New York law under the constitution and laws of the United States, says:

> "The agreement for the settlement of the suit was matter properly cognizable before that court, and should have been interposed for the purpose of postponing the trial before the referee, or should have been objected to the report, when judgment was

> moved thereon; or, if for any cause, the defendant could not then present the objection, he should, at the earliest opportunity, have applied to that court to open or set aside the judgment, and enforce the agreement to settle, or to let him in with a defense. Instead of doing this, he waits till he is sued on that judgment in another tribunal and in another state, and then substantially asks that a new trial be granted him in the original cause. * * * The plea was bad."
>
> RAE v. HULBERT, 17 Ill., 578.

Since 1856, the time this opinion was rendered, the law has undergone no change which would render the language above quoted inapplicable to the present case.

Having now shown the nature of the testimony relied upon by the Illinois Supreme Court to contradict the recital of the Michigan judgment, we recur now to the indubitable proposition that, when the fact of settlement was thus proven by that judgment, there could be no evidence of any kind competent to explain the means by which such settlement was obtained or objects sought to be attained by it.

> "The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means was it reached."
>
> LAST CHANCE MINING CO. v. TYLER M. CO., 157 U. S., 691.
>
> SOUTHERN PAC. R. R. v. U. S., 168 U. S., 49
>
> HOPKINS v. LEE, 19 U. S., 109.
>
> MASON LUMBER CO. v. BUCHTEL, 101 U. S., 639.

SOURCE OF SATISFACTION IMMATERIAL.

The fact that satisfaction was received from a party other than the plaintiff in error, creates only a difference in fact between this case and the Parker case, and not a distinction in law.

> "When the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages."
>
> LOVEJOY v. MURRAY, 3 Wallace, 1.

Although the corporation may not have been liable in the action in which the settlement was made, that fact would not impair the effect of the release.

> "The rule that a release of a cause of action to one of several persons liable operates as a release to all, applies to a release given to one against whom a claim is made, although he may not in fact be liable. The validity and effect of the release of a cause of action do not depend upon the validity of the cause of action. If the claim is made against one and released, all who may be liable are discharged, whether the one released was liable or not. BROWN v. CAMBRIDGE, 3 Allen, 474; GOSS v. ELLISON, 136 Mass., 503."
>
> LEDDY v. BARNEY, 139 Mass., 397.

The Supreme Court of Vermont quotes with approval the following from another Massachusetts case:

> "The reason is that there is but one debt or duty and that if once received by the obligee he can have no further claim; and if he discharge the one upon receiving a part or something else in lieu of the debt, or if he be satisfied so as to release one, the debt itself must be considered discharged." The court then proceeds to quote from Bacon and Coke to the

same effect, and says that "this doctrine seems to have been universally acknowledged, and there seems to have been yielded to it a general acquiescence."

BROWN v. MARKS, 7 Vt., 323.
HOPKINSON v. SHELDON, 37 Ala., 311.
LIVINGSTON v. BISHOP, 1 Johns., 290.
GUNTHER v. LEE, 45 Md., 60.

REFUSED INSTRUCTIONS.

In accordance with the foregoing principles of law, the plaintiff requested the court of original jurisdiction herein to give the jury these instructions:

"16. The jury are instructed that it appears by a certified copy of the record of the judgment entered in the case of DORA MARKS v. THE CHICAGO FURNITURE AND LUMBER CO., in the Circuit Court of Delta County, Michigan, that said cause was settled between said parties; that said cause pending in said Michigan court was based upon the same cause of action on which the present suit is based, and involved the same subject-matter, and that the settlement of said cause constituted a settlement of the present cause of action.

18. You are instructed that the undisputed evidence in this case shows that in December, 1893, the plaintiff herein brought a suit in the Circuit Court of Delta County, Michigan, against the Chicago Furniture and Lumber Company, upon the same cause of action and involved the same subject-matter involved in this suit. That thereafter the parties to said suit came to a settlement thereof, and that settlement is a complete bar to the present action, and your verdict must be for the defendant herein.

21. The jury are instructed to find a verdict for the defendant herein."

The court refused to give these instructions, but gave the following:

"You are instructed, if you find from the evidence that the plaintiff herein instituted a suit in the Circuit Court of Delta County, Michigan, against the Chicago Furniture & Lumber Company for the purpose of recovering the $4,000 involved in the suit now before you, and that she made a settlement of this cause with the defendant therein or anyone else, that the plaintiff is barred from the further prosecution of this suit, and the verdict of the jury must be for the defendant."

If the responsibility for the administration of constitutional law was to be shifted by the court to the jury, it was, of course, important that the jury be instructed upon the law on this point, and therefore the plaintiff in error offered this instruction. But he could not be compelled by the court to compromise his constitutional rights in this manner. He was entitled to the other instructions above set out, for the facts upon which they were based were not in dispute. The pendency and settlement of the Michigan cause were conclusively proved by the record, and that the two causes involved the same subject-matter was established by the evidence of both parties to the cause, and without any attempt at contradiction. This being so, the case did not rest upon any contested issue of fact requiring its submission to a jury, but presented only a question of law for the determination of the court.

Of course, the instructions were properly refused if the Illinois Supreme Court is justified in finding, as it does, that the facts set up in the plea of satisfaction were con-

tested by the defendant in error. But the court is in error. She did, by her replication, deny that the subject-matter of the two cases was the same, but this position was abandoned by her, as she herself testified that it was the same and made no attempt or pretense to prove the contrary, and all the other facts set up in the pleas of satisfaction, including the allegation that a settlement of the Michigan case had been made, were not disputed in the replication, nor in any way made an issue by her.

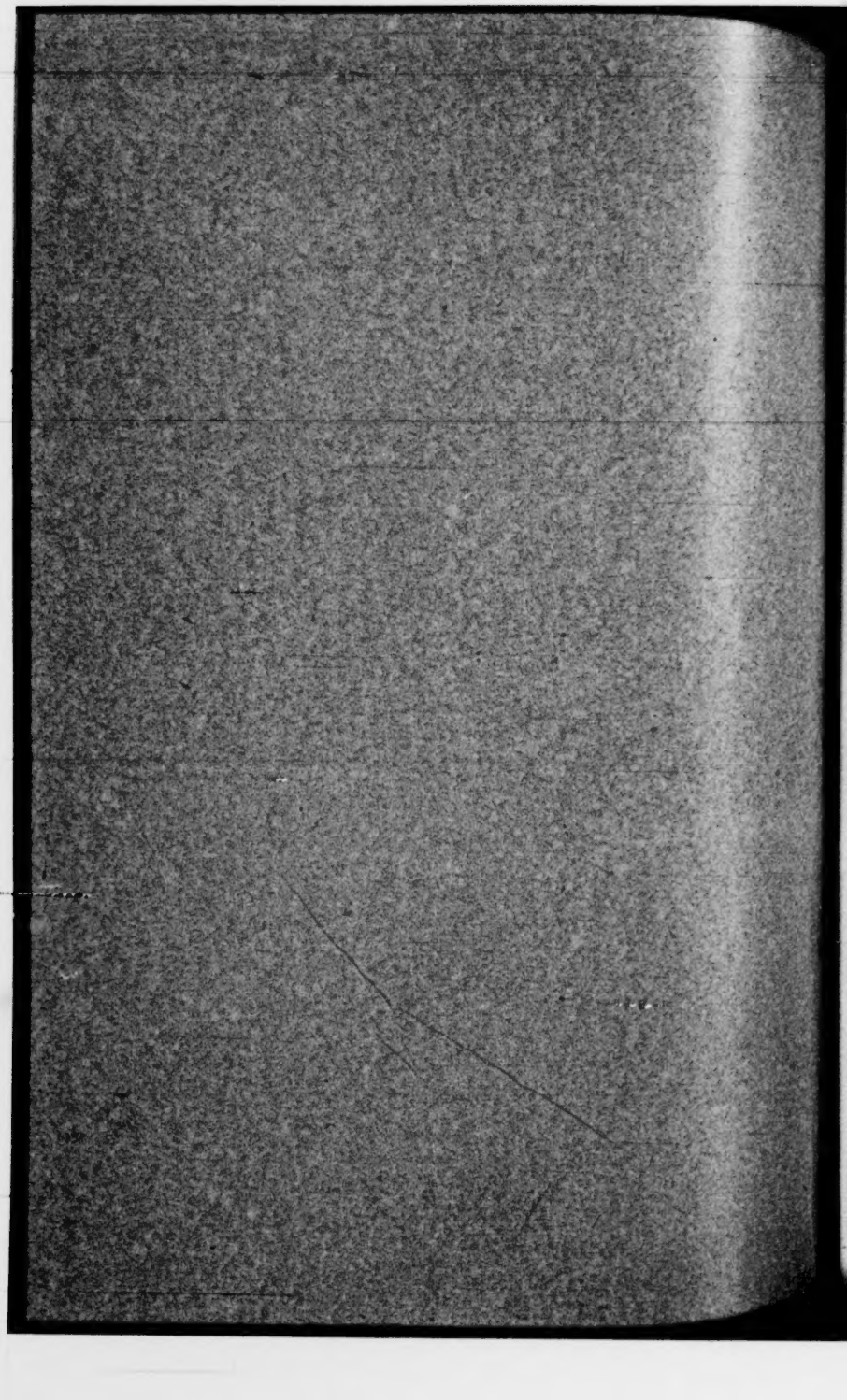
It is true that, if the instruction given by the court had been heeded by the jury, this case would then have been at an end. But the instruction failed to exert any influence, as appears by the result. Therefore, in the motion for a new trial, the plaintiff in error set up that the verdict and the action of the court failed to give full faith and credit to the Michigan judgment as required by Article 4 of the Federal Constitution, and the refusal of the court to grant a new trial upon this ground has been assigned as error in each court of review to which this cause has been taken.

Conclusion.

The Supreme Court of Illinois in its opinion finds that the Michigan case had not been settled because the agreement of settlement may perhaps not have been performed in all respects. But, to adopt the language of this Court in Carpenter v. Strange, *supra:* "That question was not open to the Supreme Court to decide, if it gave full faith and credit to the judicial proceedings of a sister state." The Illinois courts not only failed to give full faith and credit to the Michigan judgment, but utterly discredited and rejected that judgment. This point was specifically urged in all the courts below, and is, therefore, properly presented for the consideration of this Honorable Court.

Respectfully submitted.

Louis J. Blum,
Edgar C. Blum,
Attorneys for Plaintiff in Error.



APPENDIX.

Opinions of Appellate Court.

First Opinion.

Louis H. Jacobs, *Appellant,*
vs.
Dora Marks, *Appellee.*

Appeal from the Circuit Court of Cook County.

Mr. Presiding Justice Freeman delivered the opinion of the court:

This was an action for deceit. The facts are substantially the same as in *People* v. *Jacobs, 72* Ill. App., 286, where they are stated clearly and at length. There is no material difference in the evidence between that case as it is stated in the opinion and the one now presented. We see no reason for reaching a different conclusion as to the facts from the view there expressed.

In the case before us, the question was submitted to the jury whether the contract of June 8, 1893, was signed on that day as claimed by appellant or in August following, as testified by appellee. The jury find specially that it was not signed June 8th. But this finding is upon evidence almost identical with that before the other branch of this court in the criminal case. It was there said: "We are of opinion that there is a decided preponderance of evidence that the contract of date June 8, 1893, was signed on the day of its date." We are forced to the same conclusion, notwithstanding the special finding to the contrary.

The fraud and deceit charged in the declaration are that defendant was a man of small means; that he represented that one Neufeld was a man of large wealth and means, the owner of the house he lived in in Chicago, worth $20,000, and of a factory at Chicago worth $60,000, and that he, Neufeld, would contribute $25,000 in cash to the new enterprise at its beginning, and that the defendant, Jacobs, would pay in $12,500, and that confiding in these statements appellee paid in $5,000, whereas in fact Neufeld did not own said property and did not "promise or intend to pay" in $25,000, nor did defendant intend to pay in $12,500 as he at the time well knew, and that the plaintiff was thus deceived.

Appellee subsequently drew out $1,000 which was returned to her by appellant, leaving the amount of her investment $4,000.

The allegation in the declaration that appellant was a man of small means, and that desiring to induce appellee to invest $5,000 in the enterprise, he wrongfully intending to deceive and defraud, falsely, deceitfully and fraudulently represented that Neufeld was a man of large wealth and means, the owner of the house he lived in at Chicago, worth $20,000, and of a factory in Chicago worth $60,000, charges a false representation as to existing facts, and it is the only such allegation in the declaration. It is alleged that the representations were made on or about the 15th day of June, 1893. If the contract of June 8th was actually signed on that day, and, as we have already stated in our opinion, the evidence that it was so signed decidedly preponderates—then these alleged false representations were made *after* appellee had agreed with Neufeld and Jacobs to subscribe $5,000 for stock, and could have had no influence in inducing her to do so.

But this allegation as to Neufeld's wealth can hardly be considered as material by itself, and it is coupled with and made a part of the other allegation upon which appellee relied, according to her declaration and evidence, as to the representations that Neufeld and Jacobs would contribute the amounts stated to the new corporation. If Neufeld had actually made such contribution, the amount and value of his property would have been immaterial.

But these statements alleged in the declaration to have been made by Jacobs, but which appellee testifies were made by Jacobs and Neufeld, respectively, namely, that Jacobs *would put in* $12,500 cash and that Neufeld *would put in* $25,000 cash, were merely promissory.

In *People* v. *Healy*, 128 Ill., 9-15, it is said:

"In an action to recover for fraud and deceit, the plaintiff must allege the facts relied on as constituting the fraud, and where false representations are relied upon, it is essential that they relate to some material existing fact or facts and not to the future intention of the defendant, which he may or may not perform."

And the court quotes from Kerr on Fraud and Mistake, 88:

"As distinguished from the false representation of a fact, the false representation as to a matter of intention, though it may have influenced a transaction, is not a fraud in law."

The falsity of these statements, even though the promise was not intended to be complied with, would not necessarily be proven by evidence tending to show that Jacobs and Neufeld did not at the time possess the means to enable them to put in that amount in cash. The intention might have been perfectly honest and based upon expecta-

tions of being able to raise the amount as needed from time to time. Neufeld's testimony tends to show that he was able to raise the amount agreed to be contributed by himself, and Jacobs appears from the evidence to have had nearly three-fourths of the amount agreed to be contributed by him. "It cannot be said that these representations were false when made, for until the proper time arrived and plaintiff refused to comply with them, it could not positively be known that they would not be performed."

Gage v. *Lewis*, 68 Ill., 604-615.

And in the same case it is said:

"A promise to perform an act, though accompanied at the time wih an intention not to perform, is not such a representation as can be made the ground of an action at law. The party should sue upon the promise, and if this be void he has no remedy."

Representations alleged to be false which the evidence in this case tends to show relate to a material existing fact, are testified to by Mrs. Marks as having been made when she turned over her certificate of deposit for the purpose of paying in her own contribution to the capital stock of the new corporation. She says she was informed by Jacobs that he and Neufeld were ready to put their money in and that Neufeld produced three papers, white and blue, one of which she thought looked like her certificate of deposit, and said: "Here is our money." If this evidence could justify the conclusion that Jacobs and Neufeld then and there falsely represented that they were about immediately to put in, the one $25,000 and the other $12,500, and that Neufeld had the money, his own and Jacobs', or its equivalent actually in his hands as an

officer of the company, and that thereby appellee was induced to pay in her contribution, being falsely led to believe that by so doing the capital would be fully paid up, and was based upon proper allegations in the declaration, a different case would be presented. But such is not the evidence. Appellee herself says that she understood the money of the others was to be paid in from time to time "just as the business required it." It is conceded that both Neufeld and Jacobs did put in money, and appellee's testimony as to what occurred on that occasion is entirely consistent with the view that the papers produced were certificates or drafts representing money of theirs, then contributed.

We are of opinion that the declaration fails to state a sufficient cause of action.

"A verdict will aid a defective statement of a cause of action, but will never assist a statement of a defective cause of action."

C. & A. R. R. Co. v. *Clausen,* 173 Ill., 100-104.

Other questions are presented by counsel, but in view of what has been said, it is not necessary to consider them.

The judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Mr. Justice HORTON does not concur.

Second Opinion of Appellate Court.

Louis H. Jacobs, *Appellant,*
vs.
Dora Marks, *Appellee.*

Appeal from the Circuit Court of Cook County.

Mr. Justice Shepard delivered the opinion of the court upon the rehearing.

A rehearing was granted February 24, 1899, upon petition of appellee. The appellant has not availed himself of his right under the rules of this court to answer the petition, although the ten days allowed by the rule in which to make such answer have long since elapsed. We must, therefore, as is provided by the rules, consider the cause once more upon the record, abstracts, original briefs and the petition for rehearing. Our former opinion proceeded upon the theory that the facts appearing in this record were substantially the same as those set forth in the entitled criminal cause, *People* v. *Jacobs,* 72 Ill. App., 276, wherein Jacobs, having been convicted, was plaintiff in error and not defendant in error. But, upon further consideration, we think there is a material distinction in some respects between the facts of this case and of that one, and furthermore, that we should consider this case in a somewhat different aspect than was there presented because of the special finding of the jury in this case and not there existing, upon the controlling question of fact.

In response to a special request submitted to them by the appellant, the jury found that appellee did not sign a certain agreement between herself and the appellant and one Neufeld on the day of its date. Great stress is laid

in the opinion of the criminal case above referred to upon the there claimed fact that appellee did sign said agreement on the day of its date, which is the exact opposite of the fact as found by the jury in this case. The declaration here is for deceit by appellant in inducing appellee by means of false and fraudulent representations to her made by appellant to part with $5,000 of her money. It is averred "that the defendant (appellant) desired to join with one Nathan Neufeld in the business of the manufacture and sale of furniture at * * * and to incorporate a company for the purpose of carrying on said last enterprise; * * * that the defendant was a man of small means and was required by said Nathan Neufeld to furnish more money to the enterprise than the defendant had, and for that purpose was required by the said Neufeld to induce some third person to put money into the said enterprise who would agree to become one of the corporation for the purpose of carrying on the said scheme of manufacturing and selling furniture. * * * That the defendant, being anxious to join the said Neufeld in said scheme or enterprise, and being further desirous to induce the plaintiff to join with him and said Neufeld in said scheme for incorporation and the enterprise of sale and manufacture of furniture at * * * on or about the 15th day of June, A. D. 1893, wrongfully and injuriously contriving and intending to deceive, defraud and injure the plaintiff (appellee) in this behalf, falsely, fraudulently and deceitfully represented and asserted to the plaintiff that said Nathan Neufeld was a man of large wealth and means, the owner of the house he lived in at Chicago, which said defendant averred was worth $20,000, and the owner of a factory at Chicago, which said defendant averred was worth $60,000; that

said Neufeld would contribute $25,000 in cash as his share of the money to be put into the said corporation at its beginning, and that he, defendant, would pay into said corporation the sum of $12,500 and * * * the plaintiff, confiding in said representations and assertions of the defendant, at the request of the defendant, agreed to pay to said defendant the sum of $5,000 to be applied about the business of the corporation to be formed by plaintiff and defendant and Nathan Neufeld for the purpose of the manufacure and sale of furniture. * * * And the defendant by falsely, fraudulently and deceitfully pretending and representing to the plaintiff that the said false, fraudulent and deceitful representations of the defendant were true, caused the plaintiff * * * to pay to the defendant the sum of $5,000 for the purpose of becoming a member of the corporation to be formed * * * whereas in truth and in fact the said Neufeld did not own the said house he lived in, nor a factory in Chicago worth $20,000 and $60,000, respectively, nor did he own any real estate, house or factory, nor did the said Neufeld promise or intend to pay to the said corporation and enterprise the sum of $25,000 in cash, nor did the defendant intend to put into the said corporation and enterprise $12,500 in cash, as the defendant at the time of his making his said false and deceitful representations well knew. and the plaintiff further sayeth that the defendant by means of the premises * * * falsely and fraudulently deceived the plaintiff and induced her to become a member of the corporation formed of the plaintiff and defendant and the said Neufeld * * * and to take shares in the same, and thereby the said shares of stock in said corporation have become and are of no use or value to the plaintiff," etc.

The gist of the representations averred in the declaration and relied upon by appellee is not of what either Neufeld or Jacobs would do in the future—not that they or either of them would put money into the enterprise at some future time—but is as to Neufeld's present property and financial ability. It was the representation that Neufeld was then at the time the representations were made, a man of large wealth, the owner of the house he lived in, worth $20,000, and the owner of a factory worth $60,000 —present, existing and material facts—that constituted the false representations which induced appellee to contribute her $5,000 to the enterprise.

It is true the representations that Neufeld would contribute $25,000 and that Jacobs would contribute $12,500 were as to something to be done in the future by them, and if they were all that is relied upon, the declaration would fail to sustain the recovery. It was proper to state those facts in the declaration as a part of the history of the transaction, but the deceit relied upon does not depend upon them. They are important only in considering whether the representations as to the present ability were false and were material.

Appellee might readily believe that the future promises would be performed if she were assured of the present ability of Neufeld to perform them. To show to appellee his present ability to perform the future acts, the representations were made of his present ability, and were material representations. It was them that appellee avers she relied upon as true and was induced to put in her money because of, and they and their falsity and appellant's knowledge of their falsity at the time he made them were explicitly averred.

A declaration in an action for deceit that avers the mak-

ing knowingly of the false statement in relation to a matter material to the transaction, the reliance by the plaintiff upon the statement as true, and that plaintiff was induced thereby to act to his detriment and loss will, if sustained by proof, authorize a recovery.

Merwin v. *Arbuckle,* 81 Ill., 501.

Positive and direct proof of knowledge of its falsity by the one making the representation is not required, but may be inferred from other facts that are proved.

Hines v. *Richter,* 51 Ill., 299.

We regard the declaration as sufficient.

The false representations, the knowledge by the appellant that they were false, their falsity in fact, the materiality of the representations, the reliance upon them by appellee and the consequent damage, all sufficiently appear in the declaration.

The declaration avers the representations to have been made on June 15th, 1893.

The appellant introduced in evidence an agreement signed by Neufeld, the appellant, and the appellee, dated June 8th, 1893. If this agreement were signed by appellee on the date it bears, her contention that she entered into the enterprise relying upon the truth of the representations averred by her declaration to have been made on June 15th, must fall.

It is this agreement which the jury specially found was not signed by appellee on June 8th, 1893.

The day the agreement bears date the appellee was in Escanaba, Michigan, the place of its date, and she might physically have signed it at that time and place.

The appellee testifies that she did not sign the paper on the day it is dated, and names the day of signing it as August 22, 1893, and she details numerous circumstances in corroboration of her statement.

There is nothing in the paper of an intrinsic nature inconsistent with the fact of its being signed at either time.

Whether the evidence of appellee as to the date of signing the paper and the corroborating circumstances to which she testified, should or not prevail over the testimony of appellant and the Michigan lawyer, both of whom testify it was signed in Escanaba on the day it bears, is difficult to say. The circumstance that the Michigan lawyer, who was also a notary public of that state, took the acknowledgment in Chicago of the execution by these parties and Neufeld of the incorporation papers filed, with his certificate of acknowledgment in the office of the Secretary of State of Michigan, when, as he testified, he had not authority as notary public to take acknowledgments out of the county in Michigan for which he was appointed, may have materially discredited the weight of his testimony in the minds of the jury. The further fact that Neufeld, who was present at the interviews on June 8th and on August 22d, who testified in the case, was not questioned as to the time or place of appellee's signing the paper may also have had weight in the minds of the jury. If such circumstances were given much weight by the jury, and they were entitled to be considered, the jury had a sufficient basis for their finding in appellee's favor upon the fact of when the paper was signed. As between appellee and the appellant, the jury might well have believed her in preference to him. A party who takes advantage of a confiding friend is quite likely to be discredited when he undertakes by his mere word to justify his conduct.

The special finding is in all respects consistent with the general verdict, and there is no such preponderating weight of evidence against its correctness as to justify us in disregarding it.

Appellant contends that the appellee is materially contradicted in material respects by her own testimony given in an attachment suit brought by her against the corporation in the courts of Michigan. The record in this case does not show any such contradiction. Upon the trial, appellant's counsel asked appellee if certain questions were not put to her upon the trial of the suit in Michigan and if her answers thereto were not as repeated to her. Her answer to the question which was put to her (embodying in one question what purported to be several questions to and answers by her in Michigan suit) was: "It is over three years ago and I can't say just what I said on the stand up there."

An argument based upon the assumption that she testified in this court that Neufeld and Jacobs were not to put in their part of the contribution to the capital of the corporation in a lump sum, but only from time to time as the business required it, is valueless.

The only evidence in this record of any testimony given by appellee in the Michigan suit was the testimony of a stenographer who took shorthand notes of the testimony given in that case, and who, with such notes before him, testified in this case as to what her testimony there was. He, however, did not testify that he had any recollection of her testimony independently of his notes, nor that the notes truly represented her testimony, nor that the notes were in the same condition at the time of the trial as when taken down in the Michigan suit, nor

does it appear in what connection in that suit with other testimony there given her testimony if as stated was given.

The falseness in fact of the representations made to appellee by appellant, their materiality, the reliance of appellee upon them, believing them to be true, and her consequent loss, are too plainly established by the evidence to leave room for questioning the verdict upon the ground that the evidence in those respects fails to support it. The knowledge by appellant at the time of their making that as to Neufeld they were false is the only remaining material fact concerning which it may be urged there is room for doubt. But considering all the circumstances in evidence, including the particular ones that appellant had been in the employment of Neufeld for six or seven years just before in a responsible position and seemed, according to his testimony, to have possessed Neufeld's confidence concerning his business affairs, and the evidence that tended to show that Neufeld and appellant had previously entered into an agreement that appellant should have a salary of $3,500 per year from the proposed corporation if he would get appellee into the enterprise with her money, we may not say that the jury were not justified in finding this fact also against appellant.

Our conclusion is that upon the facts the verdict must stand.

But appellant contends also that there is material error of law in the record.

After appellant's demurrer to the declaration was overruled by the Circuit Court, he interposed besides a plea of general issue a special plea wherein it was set forth that

after the time at which the said false representations are alleged to have been made, appellee brought a suit in Michigan against the corporation that was formed involving the same subject-matter of this suit; that jurisdiction of the parties and subject-matter was acquired in that suit and that thereafter a settlement of said cause was come to, and before this suit was begun the Michigan court entered of record in that cause an order as follows:

"This cause having been settled it is hereby discontinued by consent of both parties without cost to either party."

To such several pleading, the appellee filed a denial of its truth by replication and upon the issue made upon the plea, evidence was heard and instructions given, with the result of a verdict adverse to the truth of the plea.

Appellant insists that even if the subject-matter of the plea was immaterial, appellee made it material by replying to it, and made the result of the case depend upon the determination of the issue upon the plea. Possibly, but the issue upon the truth of the plea was found against him. It is also insisted that under the evidence upon the issue presented by the plea and replication, the jury should have been instructed, as was requested, to find for appellant. It would have been manifestly improper for the court under the evidence, including the written agreement entered into as the basis for discontinuance of the Michigan suit, to have given the instructions that were offered and refused concerning the legal effect of the settlement of the Michigan suit. The court did instruct the jury at appellant's request in respect to the Michigan suit and settlement as follows:

"You are instructed that if you find from the evidence

that the plaintiff herein instituted a suit in the Circuit Court of Delta County, Michigan, against the Chicago Furniture and Lumber Company, for the purpose of recovering the $4,000 involved in the suit now before you, and that she made a settlement of this case with the defendant therein or any one else, that the plaintiff is barred from the further prosecution of this suit, and the verdict of the jury must be for the defendant."

Such instruction was, to say the least of it, all that the appellant was entitled to in respect of the matter covered by it. To have gone further, as the court was requested to do, and instruct the jury that under the evidence before them they should find a verdict for the appellant, must have been most manifest error, the evidence being considered.

We cannot follow appellant's argument that the discontinuance of the Michigan suit amounts to a *retraxit* in practice and constitutes a bar to this action further than to agree with him as to the legal effect of a *retraxit* as between the parties to a suit and that it differs from a nonsuit and also from a nolle prosequi.

The argument is without force when applied to the evidence introduced under the issue that was made upon the plea. The written agreement alone under which the suit was discontinued dissipates the force of the contention.

The point is made that the attachment writ in this case should have been quashed for non-compliance with the statute in the manner of suing it out. We will not prolong our opinion by a discussion of the question. The alleged error in such regard was not given among the reasons filed in the Circuit Court as grounds for new

trial, nor was it included in the single ground of variance on which the motion in arrest of judgment was based. We have, however, considered the question upon its merits sufficiently to conclude that there was not any material error committed in respect of it.

Upon a consideration of the whole record, the judgment is right and should be affirmed.

AFFIRMED.

Mr. Presiding Justice FREEMAN dissenting.

Opinion of Supreme Court of Illinois.

Louis Jacobs v. *Dora Marks.*

Per Curiam: This was an action for deceit, brought by Dora Marks, against Louis Jacobs. The plaintiff sued out an attachment in aid. The defendant appeared and pleaded to the declaration, to which replications were filed, and on a trial the plaintiff recovered a verdict and judgment for $4,000, which was affirmed in the Appellate Court. Section 31 of chapter 11 of the statute provides: "That in all actions of trespass and trespass on the case, before a writ of attachment shall be issued the plaintiff, his agent or attorney, shall apply to a judge of a court of record or a master in chancery of the county in which the suit is pending and be examined, under oath, by such judge or master concerning the cause of action, and thereupon such judge or master shall indorse upon the affidavit the amount of damages for which the writ shall issue."

The abstract shows that the defendant entered a motion to quash the attachment, "on the ground that the court, before ordering attachment did not examine the plaintiff, her agent or attorney, on oath, in open court, as to the character or nature of her case; and the clerk had no authority to issue this attachment because the order does not recite that the said judge had examined the plaintiff on oath, etc., and because no order was ever issued by any judge of this court stating the amount for which attachment was issued." The court denied the motion. The statute does not contemplate that an examination should be made before a court in session, but merely that the

party desiring an attachment should appear before a judge or a master in chancery; and upon an application of that character, no record could well be made of the proceedings before the judge or master. Here it is conceded that the plaintiff appeared before the judge and made the application and the judge ordered the writ, but what examination the judge made does not appear. It will, however, be presumed in the absence of a contrary showing, that the judge heard such evidence and made such examination as the law required. We think the motion was properly denied. It is next claimed in the argument that the plaintiff, both in her declaration and evidence, failed to make out a case. As to the declaration, it appears from the record that the defendant demurred, and after the demurrer was overruled pleaded over. It is a well settled rule that a plea to the merits after a demurrer has been overruled is a waiver of the defects in the declaration. If the declaration was insufficient and defendant desired to avail of such insufficiency he should have abided by the demurrer. Having failed to do so he cannot now complain of the declaration. It is true, there was here a motion in arresst of judgment; but this was not predicated on the ground that the declaration failed to state a cause of action, but, as appears on page 85 of the abstract, the motion was based on the ground that there was a material variance between the declaration and the evidence. If there was a variance and the defendant desired to avail of the objection, he should have objected to the introduction of the evidence when it was offered on the trial, and the variance should have been pointed out in order that the plaintiff might, if she desired, obviate the difficulty by amendment. He could not wait until the trial was over, and then avail of a variance on motion in arrest of judgment.

As to the evidence, upon an examination it will be found that it fairly tended to establish plaintiff's cause of action. Its sufficiency was settled by the judgment of the Appellate Court and cannot be considered here.

After defendant's demurrer to the declaration had been overruled in the Circuit Court, in addition to a plea of the general issue he filed special pleas in which he set up in substance, that the plaintiff on or about the 4th day of December, 1893, instituted an action in the Circuit Court of Delta County, Michigan, against the Chicago Furniture and Lumber company, to recover said sum; that service was duly had upon defendant, which entered its appearance in the cause, and said court acquired jurisdiction of the parties to said cause and subject-matter thereof; that afterwards said plaintiff and defendant came to a settlement of said cause, and at a general term of said court, on July 25, 1894, the court entered the following order: "This cause having been settled, it is hereby discontinued by consent of both parties, without cost, to either party." The plaintiff filed replication, taking issue on the facts set up in the pleas. Upon the issue formed, evidence was introduced by the respective parties, instructions were given to the jury, and a verdict was returned against the defendant on the issue presented. It is now claimed that the facts set up were a bar to plaintiff's action. A written contract was entered into between Dora Marks, the plaintiff, and the Chicago Furniture and Lumber Company, at the time the suit named in the plea was settled and discontinued, which was put in evidence on the trial. From that contract and the other evidence, it appears that the Furniture and Lumber Company never complied with the contract under which the suit was discontinued, and the plaintiff never recovered a single dol-

lar in satisfaction of her claim. If the plaintiff in the action had sued the Furniture and Lumber Company and recovered the amount of her damages, and had received satisfaction thereof, it is no doubt true that she could not recover for the same thing from another. But no such case was presented by the evidence.. Here, as the evidence showed and as found by the jury, there was no recovery by plaintiff of her damages and no satisfaction. The effect of the transaction between the plaintiff and the Furniture and Lumber Company was a mere dismissal of her action or an abandonment of her action as against the Furniture and Lumber Company, for which she recovered nothing in return, and we are aware of no principle upon which it can be held that the record in the Furniture and Lumber Company case can be treated as a bar to the present action.

It appears that the Circuit Court, on application of the plaintiff, advanced the cause for a hearing, and this is relied upon as error. The statute authorized the court, for good cause shown, to advance the cause, and the facts shown to the court were, in our opinion, sufficient to authorize the action of the court.

We find no error in the judgment of the Appellate Court, and it will be affirmed.

JUDGMENT AFFIRMED.

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No. 410.

Reply Brf. of Plaintiff in Error.

Filed Dec. 31, 1900.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

No. 410.

LOUIS JACOBS,
Plaintiff in Error,
vs.
DORA MARKS,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

LOUIS J. BLUM,
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ATTORNEYS FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

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REPLY BRIEF OF PLAINTIFF IN ERROR.

In the argument of the defendant in error, it is said that the construction of the Michigan judgment involves a question of general law. We never doubted that. In our former brief, we assumed that as an indisputable proposition and proceeded to present the question of general law. But when counsel attempt to bring this case within the line of cases holding that state decisions based upon general law are not subject to review by this Court, they overlook the authority of *Huntington* v. *Attrill*, which shows precisely to what extent that rule is applicable to the present case.

In that case the Maryland court declined to give effect to a New York judgment founded on a statutory liability, and based its refusal on the ground that the statute was a penal one. This Court held that, while the question whether or no this was a penal statute in the international

sense was one which the state court had a right to pass upon in the first instance and upon which its decision would not be subject to review if rendered in an action on the statute itself, yet as the liability had passed into a judgment which another state was asked to enforce, the general question was one which this Court would determine for itself. The Court said:

> "The case in this regard is analogous to one arising under the clause of the constitution which forbids a state to pass any law impairing the obligation of contracts, in which if the highest court of a state decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the state court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. *New Orleans Water Works Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S., 18, 38. So if the state court, in an action to enforce the original liability under the law of another state, passes upon the nature of that liability and nothing else, this court cannot review its decision; but if the state court declines to give full faith and credit to a judgment of another state, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability."

It is clear that if this Court is not without jurisdiction in this case, it has power to determine for itself the question of general law involved in the construction of the Michigan judgment. And this question of general law it has determined in the case of *U. S.* v. *Parker*. Counsel say that the language quoted by us from that case "is

obiter and not borne out by the citations on which it rests," and argue at some length that it is not a well considered case. We certainly have no better one to offer.

Defendant in error suggests that in the absence of a rejoinder the replication to the plea of satisfaction "stands confessed." We reply, first, a rejoinder reiterating the allegations of a plea is not required by any rule of pleading; second, if it were, irregularities in the pleadings are waived when parties go to trial (*Barker* v. *Green*, 48 Ill., 243); third, the subject is ignored by the courts below.

Counsel then proceed to say, in effect, that, as the record prepared under Rule 10 for the Court is not so large as the original record, the Court is bound to presume that, on the question of satisfaction, the larger record contains some evidence not found in the smaller, and on pages 9 and 15 of their brief they clearly assert or imply that there is such additional evidence. Probably these assertions are not made with any intent to misinform the Court, but they should not have been made at all, for the record, prepared under Rule 10, is in its entirety the joint work of the parties hereto, and in the acceptance of service of our designation is the following agreement, signed by all the counsel for the defendant in error: "And consent that the same, together with the additional parts of the record designated on behalf of the defendant in error herein, shall be printed by the clerk of said court and submitted to the court as the record in said cause." If, however, counsel regret having made this agreement, we are quite willing to relieve them of all responsibility in that connection, and submit the record prepared by us under Rule 10, subject to the conditions

of that rule. Upon the issue here presented, not only all the material evidence, but all the evidence that was before the state courts is now before this Court in the printed record.

Counsel say that the declaration in the Michigan case does not show that that cause involved the subject-matter of the present suit. Perhaps not; nor does it show the contrary. The declaration is not all there is to a case, and under the rules of pleading in many states, including Michigan, the plaintiff is not required to set out the nature of his claim. But if the undisputed evidence of both parties to this cause is not sufficient to establish the fact that the subject-matter of the two actions is the same, we find ample confirmation of that claim in the opinion of the Michigan court in evidence herein.

Respectfully submitted.

LOUIS J. BLUM,
EDGAR C. BLUM,
Attorneys for Plaintiff in Error.

No. 410.

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Writ of Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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BRIEF.

The matters rest so greatly on a review of facts that it is difficult to brief them properly—to do so would simply restate the argument.

The facts are reviewed.

The pleadings and the record are reviewed.

The litigation in Michigan, and later in Illinois involved different subject-matters and were against different defendants.

Plaintiff in error waived and abandoned in the state courts his present contentions.

North Chicago, etc., Co. v. *Wrixon,* 150 Ill., 532.

The decision of the State Supreme Court, not resting on a Federal question, can not be here reviewed.

Seeberger v. *McCormick*, 20 S. C. R., 128

175 U.S. 274

The Furniture Company was never released by defendant in error.

The Company and Jacobs were not *joint tort feasors*.

The Supreme Court of Illinois does *not* take judicial notice of the statutes or law of Michigan. (Nor can this court on writ of error in this case.)

Miller v. *Wilson*, 146 Ill., 528.
Dearlove v. *Edwards*, 166 Ill., 621.
Hakes v. *Bank*, 164 Ill., 275.
Huntington v. *Attrill*, 146 U. S., 657.

Review of citations in opposing brief.

A dismissal, though reciting that it is by agreement, is not a bar to a subsequent suit.

Haldeman v. *U. S.*, 91 U. S., 585, 586.

Nor is a decree when entered by consent.

Gay v. *Wadhams*, 73 Ill., 415.
Lawrence v. *Janesville*, 138 U. S., 552.

A judgment on a different subject-matter can not be used as a bar.

Kitson v. *Farwell*, 132 Ill., 327.

The prayer for a directed verdict must be by "*written*" instruction.

W. C. S. R. Co. v. *Foster*, 175 Ill., 396, 398.

The jury may ignore an erroneous instruction.

McNulta v. *Ensch*, 134 Ill., 46.
W. C., etc., Co. v. *Maney*, 170 Ill., 422.

Whether one party has been released by a release exe-

cuted to another or satisfaction received from another, is always a question of fact, to be determined by the jury from all the circumstances, and should be submitted to the jury.

Cooley on Torts, page *139.
Robinson v. *Stow*, 39 Ill., 568, 572.
City v. *Babcock*, 143 Ill., 358.
Parmelle v. *Lawrence*, 44 Ill., 405, particularly page 410.
Moore v. *Stanwood*, 98 Ill., 605, especially 628.
Thomason v. *Clarke*, 31 Ill. App., 404, p. 407.
Lumberman v. *Preble*, 50 Ill., 332; please read opinion in full.

A discontinuance does not bar a subsequent action for the same cause.

Am. and Eng. Enc. of Law, page 667, and cases cited.
See *Haldeman* v. *United States*, 91 U. S., 584.
Black on Judgments, Vol. 2, Par. 701.

The question whether a given thing has been received in satisfaction in the absence of an express agreement in so many words, is a question of fact.

Hart v. *Boller*, 15 Sargent & Rawle, 162.

An accord without satisfaction does not limit the recovery by the creditor to the amount agreed upon by the accord, but he may sue on the original claim.

Campbell v. *Hurd*, 26 N. Y. Supplement, 458.
Simmons v. *Clark*, 56 Ill., 96.

The accord must be actually and fully executed to form a defence.

Frost v. *Johnson*, 8 Ohio, at p. 395.

Smith v. *Cranford*, 32 N. Y. Supplement, at p. 377, affirmed 49 N. E. R., 1104.

Simmons v. *Clark*, 56 Ill., 96.

Citations of opposing counsel reviewed.

JOHN F. DILLON,
Attorney for Defendant in Error.

ANDREW J. HIRSCHL,
JOHN W. BYAM,
Of Counsel.

ARGUMENT.

May it please the Court:

The questions involved herein are few and simple. The contention is essentially as follows: The defendant in error (hereinafter referred to as Mrs. Marks) was induced by plaintiff in error (hereinafter referred to as Jacobs) to deliver to him $5,000, with which he was to obtain for her $20,000 of the stock of the Chicago Furniture and Lumber Company, a corporation, which expected to operate, or was operating, in Delta County, Michigan, and to which hereinafter for the sake of brevity we will refer as the Company.

These transactions, that is, the obtaining by Jacobs of Mrs. Marks' money, and the obtaining by her of said stock in said Company, occurred in 1893, and became consummated at some time in August of that year.

Mrs. Marks, on December 4, 1893, considering that she was entitled to have the money refunded to her (less $1,000 which in the meantime had been returned to her), brought a suit against the Company in Michigan (Circuit Court of

Delta County), and obtained an attachment there against the Company.

This suit remained in court until July, 1894.

July 14, 1894, Mrs. Marks and the Company entered into an agreement in writing, which is set forth on pages 2 to 5 of brief of plaintiff in error.

By this agreement—which was purely "*executory*"—by this executory agreement the Company was to do the following things:

First. To pay Mrs. Marks $1,000 "*as soon as*" the Company *would dispose* of its stock *to the amount* of $1,000.

Second. The Company was to pay $3,000 to Mrs. Marks *on the day* that it *would* obtain possession of, and a clear title to, its plant in Michigan.

Third. The Company to discontinue its damage suit then pending against Mrs. Marks.

Fourth. The Company further agrees to release Mrs. Marks from all liability for the balance due on unpaid stock.

Thus far are the undertakings of the Company.

Now come the undertakings of Mrs. Marks.

She on her part agrees to sell her $20,000 of stock to the Company and accept payment as aforesaid, and further to discontinue her attachment suit.

Pursuant to this arrangement there was entered in said court in Michigan, on July 25, 1894, the following order: "This cause having been settled, it is hereby discontinued "by consent of both parties without cost to either party."

In 1897 Mrs. Marks sued Jacobs in the Circuit Court of Cook County, Illinois (Chicago), in an action on the case, asserting that he had deceived her by false representations,

and thereby obtained from her the $4,000, which he had put into the Company.

In this suit Jacobs pleaded *not* guilty.

And *pleaded specially* that Mrs. Marks had sued the Company in Michigan, and in that suit the entry of the case being settled and discontinued was made, and that *so* the "plaintiff *has received satisfaction.*"

Another special plea set up the same facts as to the Michigan litigation, and that an attachment had been issued therein, and a settlement made and the suit discontinued and "*so* plaintiff has *received satisfaction.*"

The plaintiff replied to these special pleas to the effect that the cause of action in her declaration (in Cook County against Jacobs) is "*not the same claim*" as that sued on by said plaintiff in said cause in the Circuit Court of Delta County, Michigan.

There was no rejoinder to this *replication,* nor was the same attacked by demurrer or in any manner, but so far as the records show *stands confessed.*

The cause proceeded to trial, the jury found Jacobs guilty, and assessed the damages at $4,000.

Jacobs appealed to the Appellate Court of Illinois, wherein, with an opinion by Judge Freeman, the decision was reversed, but *later,* on a rehearing, the *decision was affirmed.*

Jacobs then appealed to the Supreme Court of Illinois, which in turn affirmed the Appellate Court, and now Jacobs brings the cause here upon a writ of error.

The *two opinions* of the Appellate Court and the opinion of the Supreme Court of Illinois are attached to the brief of Jacobs here.

It was the contention of Jacobs in the trial in Chicago

(Circuit Court of Cook County, Illinois), that Mrs. Marks did in the Michigan litigation *release* the Company, and that thereby she *released* Jacobs.

On this he invokes the highly technical doctrine that the release of one *joint tort feasor* releases the others.

This contention Jacobs made by asking an instruction to the jury, which was refused, and hence he claimed in the Appellate and Supreme Courts of Illinois, and now complains here, that the trial court and reviewing courts of Illinois have not given full faith and credit, etc., to the Michigan judgment.

And on that he bases his present prayer for reversal.

To this contention there are several answers, as shall presently be discussed.

To summarize them in advance we may say, first that Mrs. Marks has *never released* the Company; secondly, that even if she did, the Company was not a *joint tort feasor* with Jacobs; third, that the point has been waived on this record; fourth, that the opinions of the State courts are broad enough to sustain themselves on other grounds regardless of these matters, and hence that a Federal question is here not necessarily or at all involved.

These four propositions we will now consider, but not exactly in their order.

It will be apparent at the outset that the evidence in the trial court, covering some three hundred pages of typewritten transcript, has not all been brought into the printed record spread before your Honors. Nor could it be. Only that which relates to the supposed Federal question would be proper here. All that which relates to the case on its merits as to whether the fraud was actually perpetrated, etc., does not belong here. On all such matters the State courts are the final arbiters.

Be the State court right or wrong. your Honors sit not here to review them on matters such as these.

It will also be borne in mind that the special pleas, which had reference to the Michigan litigation, alleged the *settlement* thereof, and that Mrs. Marks had *received satisfaction.*

The *replication* alleged that the *subject-matter* was "*not* "*the same claim.*"

This replication stands confessed; but supposing that it was deemed as traversed (although not actually so) by the cause proceeding to trial, then all the evidence either to support the *plea* that the plaintiff had "*received satisfaction,*" or, to support the replication, namely, that "*it is not the* "*same claim,*" would be evidence upon issues purely within the exclusive and final jurisdiction of the state tribunal, and would present simply a question of fact, and one not subject to review by your Honors, no matter how erroneously the state tribunal might act.

So also the replication to which we have alluded either stands confessed for want of a rejoinder that the claim sued on in Chicago is not the same claim as the one sued on in Michigan, or else if not confessed it stands proved to the satisfaction of the state tribunals, the final arbiters of that question. No pretense is made in the printed book before your Honors to set up *either all* or *any of the evidence* which on these propositions was spread before the state tribunals; nor would such evidence be here appropriate.

Jacobs can not bring it here because it relates purely to matters of State court concern.

Surely in the few pages which he devotes to the evidence he does not pretend to bring it, nor on our part do we.

Supposing the State Supreme Court erred in finding not

proved Jacobs' plea that the plaintiff had "received satis-
"faction."

That would be an error not subject to review here. Supposing the State Supreme Court erred in finding as proved the replication that the claim sued on in Chicago was not the same claim as the one sued on in Michigan; such error would not be subject to review here.

We do not bring into the record here the evidence underlying these findings to demonstrate that the findings are correct, we rely upon the fact and the law that even if these findings are not correct and the record should so show, your Honors would be beyond jurisdiction to reverse as you are not here as a reviewing tribunal in these matters over the State court.

But so far from these findings being erroneous or from our bringing evidence in to support them and prove they are correct, we can assert here confidently that they are not erroneous, and that even the fragmentary evidence which has been spread before your Honors absolutely proves their correctness.

It is shown on the face of the record as printed here that plaintiff in fact never received satisfaction for her $4,000, or any part thereof, and further it is shown that the claim sued on in Chicago is not the "same claim as that sued "on by plaintiff" in Michigan.

This replication therefore standing, as we say, either confessed, would end counsel's contention, or if this replication be deemed traversed then this evidence would end counsel's contention.

We say the meager evidence in the record proves beyond question that the claim sued on in Chicago is not the same claim as that sued on in Michigan.

It requires no great logical analysis to understand the word "claim." Its leading and primary definition, and one generally understood, is found in Anderson's Dictionary of Law as "a demand of some matter as of right made of one "person upon another," thus clearly it resolves itself into three elements, namely, the subject-matter, the person demanding, and the person from whom demanded.

Or we may say the *res,* the demandor, and the demandee.

To be therefor the same claim these three elements must be the same. Now, in the Michigan litigation there was the same demandor as in the Chicago suit, namely, Mrs. Marks, plaintiff in each. But in Michigan the demandee was the Company, whereas in Chicago it is Jacobs. Thus a fatal failure of identity in that respect. In other words, a claim which we may make upon Doe is certainly not the same claim with a demand which we make upon Roe.

And this is true even if the *res* should be the same. A single illustration will suffice: The clerk in a store sells a bushel of apples under the belief that he has sold them to Doe. The store-keeper sues Doe, and on the trial Doe proves an *alibi* and judgment results in his favor; but evidence is shown from which it is learned that another person, in the same community, namely, Roe, resembles Doe so greatly as at times to deceive. Thereupon the store-keeper sues Roe.

Now, if these are the same claims it would follow that the first judgment would be a bar to the next suit.

Clearly they are not the same claims. Clearly the judgment is not a bar to the second suit.

There, at least, you have two elements the same, the *res* and the demandor, that is, the bushel of apples and the store-keeper. But in the case at bar, may it please the Court, we have not even the same *res.*

This court has held that there must be identity of the subject demanded, also of the *cause* of demand, and of the *parties* and even of the *character* in which they act.

Packet Co. v. *Sickels*, 24 How., 331-341.

The evidence in the record, though meager, does contain, however, the declaration of Mrs. Marks in the Michigan case. Clearly from this declaration can be learned the nature of her "claim."

If there is any step in a litigation which shows what the subject-matter is, it must be the declaration. We have not before us the printed record laid before your Honors, as it has not yet been prepared, and hence we are not able to point to the particular page and line, but your Honors will find therein the Michigan proceedings and the same will set forth the declaration filed by Mrs. Marks in Michigan.

It will be found corresponding to the original transcript, pages 186-187.

We are unable to say that the declaration will appear in full in the printed book. If it does not appear at all, then every presumption must be indulged in favor of the correctness of the acts of the Illinois Supreme Court.

If plaintiff in error here fails to bring that Michigan declaration to the attention of your Honors in having it printed in the record, then you must on familiar principles infer that it was such as justified the Illinois court in its decision.

If, however, said declaration has been printed into the abstract, and the same is now in the presence of your Honors, you will find that it is a declaration in *assumpsit*. Mrs. Marks complains of the Furniture Company "of a plea of "trespass on the case upon promises," and then follow "*the* "*common counts.*" In other words, the Michigan declara-

tion is *simple* and *solely* an assumpsit on the common counts. It lays the amount of the "goods sold" at $7,000, and lays the damages at $7,000.

Now, consider the declaration and the suit in Chicago. It is in "case." And alleges the obtaining by Jacobs through false representations of plaintiff's money to be invested in the Furniture Company, the plaintiff to become a stockholder.

It would be an imputation upon the intelligence of this court for us to attempt to further demonstrate what is so readily apparent, that the *res* or subject-matter involved in the claim in Chicago was something entirely different from that involved in Michigan.

Had Mrs. Marks actually tried this assumpsit suit against the Company and lost it, it would have been no bar to an action in "case" for false representations.

Or had she tried in this assumpsit to prove the fraud in question, she would not have been allowed so to do.

It follows, therefor, not only that no Federal question is involved, but also that the state tribunals decided correctly in sustaining the replication on the basis that the claim before the court in Chicago was not the same claim as that which had been before the court in Michigan.

There was the same demandor, but not the same demandee, nor the same subject of demand.

Even if it be supposed that the State Supreme Court erred with reference to some of the matters above discussed, and that your Honors have jurisdiction to review such error, then an opportunity should first have been given to the said court to correct its error, *if such opportunity has not* been given then such error *is deemed waived.*

It is an elementary rule that a court of review will not

consider an alleged error, which was not brought to the attention of the subordinate court, for had it so been, that court would have had an opportunity of correcting such error.

The matter of which counsel now complains, even if it be an error on the part of the Supreme Court of Illinois, could and should have been presented to that court, and it should have been requested to review itself in that record and correct such error. The appropriate way to accomplish this would be by a *petition for a rehearing.*

Counsel did indeed file such petition, and we propose now to bring to the attention of your Honors precisely what said petition contained.

We file this present brief at an early date in order to give opposing counsel time in which to reply.

And they will in their reply *not deny* that we are now setting forth correctly their petition for rehearing.

Should they make such denial we will then cause to be certified before your Honors by the Clerk of the Supreme Court of Illinois, a copy of such petition, as that will be the only practical way to demonstrate the correctness of our present assertion, and it is a method which is recognized under similar circumstances.

North Chicago Railroad Co. v. *Wrixon,* 150 Ill., pages 532-534.

But we say that they will not deny it, and we now follow with their entire petition for rehearing.

The first paragraph of said petition takes up an alleged irregularity in the issuance of the attachment writ. The second paragraph takes up the insufficiency of the declaration. The third and fourth paragraphs we give in *haec verba.*

"*Third.* The court in its opinion held, on the plea of satisfaction, that as defendant in error did not actually receive the amount involved herein, there was no satisfaction. This finding was made by the court upon oral evidence, in contradiction of the Michigan judgment, which imports absolute verity, and such evidence was entirely immaterial and incompetent.

"*Fourth.* We furthermore submit that Article 4 of the Constitution of the United States requiring that full faith and credit be given to the judicial records of another state, required that the record of the Michigan judgment be accepted as conclusive of the fact therein recited, to wit, that the cause had been settled, and the oral evidence tending to show that there was no satisfaction was incompetent. And that this provision of the Federal Constitution, although not considered in the former opinion of the court, is a question fairly arising in this cause, and should now be considered herein.

"Upon these grounds, we respectfully pray for a rehearing."

(Signature of counsel follows.)

We have thus given *in its entirety* the petition for rehearing.

It will be observed that the *third* paragraph of the rehearing petition complains that the court finds that Mrs. Marks did not actually receive satisfaction.

And the *fourth* paragraph that oral evidence tending to show there was no satisfaction was incompetent.

These are the only pertinent matters set forth in the petition for rehearing.

Now, turning to the opinion of the State Supreme Court, it will be seen, near the end of the opinion, that a "*written* "*contract*" was in evidence, and that "from that contract "*and other evidence*" it appears that the Company *never complied* with the contract, and the plaintiff *never recov-*

ered a single dollar *towards satisfaction.* Or, in other words, the Supreme Court of Illinois is influenced in its result by the contract and the "*other evidence.*"

What was that other evidence? Is it reproduced in the printed records now before your Honors? Is there any attempt made so to do? And even if it were, would your Honors have the jurisdiction to review it? and say that the Supreme Court of Illinois *erred* in reaching the conclusion which it did upon said *other evidence.*

Suppose that the Supreme Court of Illinois erred in any way either as to the weight, probability, effect or intendment of such other evidence. Could your Honors reverse for that reason? We think you are without jurisdiction so to do.

You certainly would not so do where even if this be an error it was not called to the attention of that court in the petition for a rehearing.

Counsel now have much complaint and also had some complaint in the petition for rehearing that the *oral evidence* tending to show *lack of* satisfaction was *not competent.*

Here, again, we will say that the matter is not covered in the presentation of the case in the State Supreme Court.

In the *printed abstract* in that court the only allusion to this subject is found at the bottom of printed page 74, in which Mrs. Marks, being then in rebuttal and having been recalled, testifies "about the dismissal of that suit against "the Chicago Furniture & Lumber Company there was a "writing. That is the writing." Said paper offered in evidence by plaintiff, marked "Exhibit 11." (Then follows the paper in *haec verba* the same as Jacobs' counsel here have given it on pages 2 and 3 of their brief.) Then, resuming her narrative, Mrs. Marks says:

"The president of that Company never carried out his

contract on the part of the corporation; he said that he would not give me anything; that the stock was not worth anything, and he said he would not give me a cent for the stock. I called upon him about July or August, 1894."

We have above set forth absolutely *all* that appears in the printed abstract in the State Supreme Court with reference to this topic.

It will be seen that *no objection* is presented whatsoever to her testimony. It will therefore be seen that if the trial court committed any error in accepting her oral testimony, that error was waived because not set forth in the printed abstract in the Supreme Court and, being waived there, it must be deemed waived here.

If the State Supreme Court properly ignored that error, because of failure to perserve it in the printed abstract, then the State Supreme Court decided correctly, and your Honors have no reason to reverse it.

We say with reference to the abstract in the State Supreme Court that we have above correctly rehearsed it, and if opposing counsel in their reply brief deny that we have so done, we will again proceed as above indicated, and we will cause one of the printed abstracts to be certified up by the Clerk of the Supreme Court in proof of our assertion—that being the only practical way to accomplish such results, and the precedent being that way, see again—

North Chicago Railroad Co. v. *Wrixon, supra.*

We have thus shown that the opinion of the Supreme Court is broad enough to decide this case, without reference to any Federal question, and when there is such breadth then your Honors have no jurisdiction to entertain such a question. See citations at end of opinion in

Seeberger v. *McCormick* (Dec. 4, 1899), 20 S. C. R., 128.

175 U.S. 274

To restate this ground we say briefly that defendant's special plea that plaintiff had *received satisfaction for this same injury* was found, and most properly so, against him; that plaintiff's replications that the *claim was a different one* was found, and most properly, so to be fully proved; that defendant's contention now that oral evidence of satisfaction is not admissible in the face of the Michigan judgment has been waived, not being presented to the State Supreme Court; that said Supreme Court's decision upon the "other evidence" that the contract of settlement had not been complied with can not be here reviewed, because the review of said "other evidence" was not brought to the attention of the State Supreme Court in the petition for a rehearing, and that court was given no opportunity to correct itself if indeed it was in error with regard to such "other evidence."

As above indicated, Jacobs contends here that the Michigan judgment released the Company, and hence released him, because of the principle that the release of one *joint tort feasor* does release the other.

To this we now say, first, that the Company was never released and, second, even if it were it was not a "*joint tort feasor*" with Jacobs. Nor did Mrs. Marks ever claim or assert that the Company was a *joint tort feasor* with Jacobs.

We have said that the Company was never released. The Michigan record shows that the matter had been "settled" and the case is discontinued.

The Illinois record shows that the agreement of settlement has not been complied with. It so shows without presenting any error there over which your Honors have any jurisdiction even if any error exist as we have above discussed. If, then, it be true that the Michigan agreement of

settlement has not been complied with, it follows that Mrs. Marks is *at liberty to-day* to sue the Company in *precisely* the same manner *that she sued it before.*

True it is, that if the Michigan record would show a judgment in favor of the defendant, and Mrs. Marks should now sue that same defendant (the Company), then said Company could plead said judgment in bar and properly so.

But there is *no judgment* in favor of the Company, and hence nothing which it can plead in bar.

There is only a discontinuance. It has never been held that a discontinuance of the first suit is a bar to the second suit. But counsel say this is more than a discontinuance, they say that the Michigan record recites the fact that the cause has "been settled."

But this is only a "recital" and not a judgment.

Nor does the recital indicate *how* it has been settled.

It may have been settled on sundry *conditions precedent.* If such conditions afterwards do not occur, then, of course, *the settlement does not become efficacious.*

If, therefore, in later years Mrs. Marks again sues the Company and the Company would plead "discontinuance" of the first suit, Mrs. Marks would show that a mere discontinuance does not bar a second suit; and if, on the other hand, the Company should plead a prior settlement Mrs. Marks would reply that the settlement had never been carried into effect; and yet again, if the Company should plead the prior judgment of a court stating that the parties had settled, Mrs. Marks could again reply that the prior judgment so stating, *while correct enough at the time it was entered,* yet in *later sequence* became displaced by reason of such *settlement failing.*

All this could properly be done *without violating* the principle that *judgments shall not be collaterally assailed.*

Now, if all this can be done in a litigation which we are supposing to take place in the future between Mrs. Marks and the Company, much more can it be done in a litigation which is not even against the Company at all, but against a *third person* altogether.

And such in fact has happened in the case at bar. And having so happened, it fails to present a "Federal question." The full faith and credit to which a Michigan court record is entitled has been given it, it was fully considered by the Supreme Court of Illinois, and that court was bound to come to its decision in accordance with the prior practices and decisions in Illinois.

True it is that the Michigan record is entitled in Illinois to the full faith and credit to which it would be entitled in Michigan. That is to say, that the record is entitled to the faith and credit which pertains to it in the state in which it is made originally.

But when the case is tried in Illinois the courts of Illinois will presume the decisions of Michigan to be the same as are the decisions in Illinois, unless the contrary be proved.

Herein the rule as to judicial notice *differs.*

The Federal courts *will* take judicial notice of the *laws and decisions* of *each* of the states, but such is *not* the case with the State courts.

With some exceptions each *State court requires proof of the laws and decisions of another state.*

In *Miller* v. *Wilson,* 146 Ill., 528, it is held that the Supreme Court of Illinois will presume the law of another state to be the same as it is in Illinois, *unless the contrary be proved;* and see bottom of page 531, there was no proof

what the "statute *or law* of Kansas was." See also *Dearlove* v. *Edwards*, 166 Ill., 621; *Hakes* v. *Bank*, 164 Ill., 275, and cases cited.

The record in the case at bar fails to show that the law of Michigan was brought into the evidence in the trial in Chicago.

Under these circumstances, and foregoing citations, the Illinois courts must presume *that the decisions in Michigan are the same as those in Illinois.*

The Supreme Court of Illinois has therefore followed *its own prior views* in deciding this case.

What these views are, and what the prior decisions in Illinois are, we shall see presently.

If the Supreme Court of Illinois has decided correctly because of the *absence of evidence* to the contrary, then your Honors can not say that it erred, although you in turn might perhaps have before you decisions from Michigan which might tend to show a result different from that reached by the Supreme Court of Illinois.

This court, in *Huntington* v. *Attrill* (146 U. S., 657), in the majority opinion recognizes this principle and admits that the law of New York should have been *proved as a fact* in the Maryland courts, and not having been so done, then your Honors can not take judicial notice of it on a writ of error to the Maryland court. (18 S. C. R., page 232.)

But we will show eventually that not even from the Michigan decisions, nor yet from that great expounder of the same, Judge Cooley, is the result of the Illinois Court erroneous.

We have said that Mrs. Marks could to-day sue the Company, and the prior Michigan record would be no bar.

To this counsel say that it would be a bar.

Not because of the "discontinuance" therein set forth, but because it is therein said that the cause "has been "settled," and they cite

U. S. v. *Parker*, 120 U. S., 96.

That case, however, was entirely different from the case at bar.

The first suit was upon the bond of an Indian Agent.

The *defense* was a denial of liability, and that the defendant had *adjusted* his accounts in Washington, and been "discharged." On the trial the defendant introduced evidence to this effect, and thereupon the record shows that the court does, with the consent of the Government attorney, find that "the subject-matter in this suit has been *adjusted* and settled "by the proper parties in Washington. It is therefore "ordered that the case be, and the same is, hereby dis-"missed."

Thereafter the Government again sued the very same defendant upon the same bond.

And it was held that the first judgment is a bar. The opinion proceeds *strongly* on the basis that the *proceedings and proofs actually* had in court and the recital in the judgment indicated that the judgment of dismissal was rendered "*on the merits*" and "because the *defense* of the defendant "was *found* to be sufficient in law and *true* in fact."

Thus the case differs from the case at bar, in which the record shows just the opposite: No evidence introduced, no proceedings after issue joined and merely a recital that the matter had been settled.

In this *Parker* case there is language in the opinion, we may admit, capable of the construction put upon it by our opponents, but the same is *obiter* and not borne out by the citations on which it rests; that is to say, it is not borne

out sufficiently to apply it to the circumstances of the case at bar. One of these citations is

Bank v. *Hopkins*, 2 Dana, 395,

in which the Kentucky court says that an entry of "dismissed agreed" is a bar to a future litigation.

The opinion, however, in that case clearly shows that the plaintiff failed *to reply to the special plea, alleging* such dismissal and *agreement.*

Now, suppose that plaintiff had replied (as she actually did in the case at bar), that is, suppose said Kentucky plaintiff had replied showing that the cause settled was *not the same* as the *next cause sued on* and again had *replied* showing that the defendant's *special* plea of *satisfaction* was *not true,* because, *in fact, there had been no satisfaction.*

Under these circumstances the court would have been called upon to rule upon the admissibility of evidence under such replication. There being no replication in the Kentucky case what the court there says as to whether evidence would have been heard, was not involved in that litigation.

The other citation is *Merit* v. *Cambell,* 47 Cal., 542. Here, also, there was no replication nor any evidence offered.

In neither of these two cases was any evidence offered.

Hence the assertion by your Honors in the *Parker* case, taken from *these* two cases, that anything to *overcome the dismissal* must be included in the "agreement *and* in the "judgment" is *uncalled* for.

Nor is it a well considered assertion.

To say that such matter must be included in the "agree-"ment *and* in the judgment" is not reasonable.

Evidently the word "and" between the words agreement and judgment should be "or."

Had the court acted advisedly it would no doubt have said that matter in the agreement "or" judgment will suffice, etc., for clearly *if* matter is *in the judgment* it does *not* have to be in the agreement. Hence we say that the expression was ill-advised.

As the judgment always, at least *prima facie*, portrays all prior agreements.

Further, we say that if matter was in the agreement it does not have to be in the judgment, provided such matter be made applicable by proper replication.

On *this* proposition *this court* is on record to *the fullest extent:* In

Haldman v. *U. S.*, 91 U. S., 585,

your Honors held *bad* on demurrer *former pleas*, which showed a dismissal.

And especially, on page 586, your Honors deal with a former dismissal, which was by *agreement* being thus "*dismissed agreed.*"

Your Honors say that *regardless* of the effect given by the courts of Kentucky to such an entry it does *not* in your opinion "*import an agreement to terminate the controversy.*"

You further say, and we ask you to read the entire page 586 of that report, that a dismissal even with the recital that the matters were agreed on, *imports an intention to preserve* the claim and the *right* to a *new suit* "if it becomes neces-"sary."

We have above indicated that the Supreme Court of Illinois has in the case at bar followed its own prior decisions; that no evidence was given of the Michigan decisions; that it is a settled law of Illinois that its courts do not take judicial notice of the decisions or law of the other states.

If, then, our court has so done in this case, and has correctly decided the cause, your Honors cannot reverse it even if you *do* take judicial notice of the Michigan decisions.

Nor if you consider that our court has erred can you reverse it, as it is an error on topics relating to general law, as was the case in *Abbott* v. *The Bank*, 175 U. S., 109.

All of counsel's citations excepting those by us above reviewed present instances in which it can clearly be seen that the judgment was final and upon the merits, and do not present any such instance as is in question here.

Their citation

Hubbell v. *U .S.*, 171 U. S., 209,

does, it is true, use the word "dismiss."

But that was a *petition* before the "Court of Claims," and hence the word dismissal is not only an appropriate, but the *only word* which can be used under such circumstances.

You could not very well enter judgment in favor of the defendant or judgment against the petitioner as you would in an assumpsit suit.

The finality of a *petition* is its dismissal.

Moreover, the reading of that case will indicate that the *merits* were offered and fully considered.

The Supreme Court of Illinois, in the case at bar, most properly in the absence of any proof of the Michigan law on the subject, did, as we say, but follow its own prior rulings.

Gay v. *Wadhams*, 73 Ill., 415,

is to the effect that a consent decree does not constitute *res adjudicata*.

Principle of this case is fully approved in *Lawrence* v. *Janesville*, 138 U. S., 552, and cases cited therein. There

is language in this case of *Gay* v. *Wadhams* broad enough to make it applicable to law as well as chancery. The case has frequently been followed and is the settled law of the jurisdiction. (See also 161 Ill., 600.) It is not *res adjudicata*, because the court has not exercised judicial functions—there was no argument, no consideration, no contest. The court simply exercised an "administrative function" "by entering the agreement of the parties." Such language was used with regard to a formal decree and is of course still more apt concerning a "mere discontinuance."

Counsel's formidable array of decisions are little to the point; each case must depend upon its own circumstances.

In very few of those cited did your Honors reverse the State court, and when you so did the record clearly shows that the case turned and turned entirely upon the foreign judgment, and that it was an absolute judgment upon the merits awarding some definite recovery and such definite recovery of course had to be respected in every jurisdiction.

Nothing of the sort exists in the case at bar. Mrs. Marks sues Jacobs in Chicago. He asserts that he was released because she had sued the Company in Michigan and settled and discontinued that suit.

The court in Chicago admitted the evidence of the Michigan proceedings, gave them full consideration and decided that they were not a bar to the Chicago suit.

Nor could they be.

Here, again, the Illinois courts do not take notice of the laws or decisions of Michigan, because not proved in evidence; that they so refuse is the settled law of Illinois as by us above quoted.

Consequently in the absence of other proof the Illinois courts will follow the Illinois decisions and their so doing

can not constitute error; although were the case to be heard in the first instance before your Honors you would take judicial notice of the Michigan decisions and might perhaps come to a different result. Although we shall show presently that even under the Michigan decisions you would reach the same result as did the Illinois court.

It is the settled law of Illinois, see

Kitson v. *Farwell*, 132 Ill., 327,

that a judgment must be upon the same subject-matter and between the same parties to be a bar, and that even if between the same parties yet if on a different subject-matter it would not be a *bar*, but may be used in evidence by way of estoppel.

The Michigan record involved here is not a judgment at all, nor is it the same subject-matter, nor yet between the same parties; hence properly is not a bar in Illinois, nor an estoppel in evidence.

Should your Honors see fit to consider the Michigan cases you will find that they bear out our assertions concerning them. Thus, counsel cite *Jacobson* v. *Miller*, 41 Mich., 98 (1 N. W. R., 1013), which, however, fully sustains us. The opinion by Judge Cooley recites judgment for an installment of rent upon a lease; and yet, in a later suit on the same lease for a later installment, the same defendant was allowed to dispute the execution of the lease (in the earlier suit he had not put the execution in issue), the court holds that the *subject-matter* in the two suits was *different*.

But conceding for the sake of the argument that it is a judgment, and that it is on the same subject-matter, it is still not between the same parties—in Michigan the Company was defendant, whereas in Chicago Jacobs is defendant —hence in the best event the Michigan record is but evidentiary as tending to prove the special pleas, namely, that

Mrs. Marks had in Michigan received *satisfaction,* and also as tending to disprove her replication, namely, that the claim in Chicago was different from the claim in Michigan.

Being thus evidentiary, the Illinois court gave it full effect by allowing it to be in evidence on these above propositions to the jury, and if the jury, after hearing, as the Supreme Court of Illinois says, the agreement and "other evi-"dence," saw fit to decide that she had not thus received satisfaction, and that the claim made in Chicago was not the same claim as the one made in Michigan, why it follows that your Honors are without jurisdiction to review this record.

This result found by the State courts, whether right or wrong, is not here for review, as it is reached upon common law principles of the effect to be given to the Michigan record in connection with the other evidence, and is reached after giving full faith and credit to the Michigan record for what it was worth.

Under the circumstances involved and in the state of the pleadings with the evidence in the record that there is (which, if objected to, yet the objection was waived, as we have shown by not bringing it before the State Supreme Court)—under these circumstances it can not be doubted that had the suit against the Company been in Illinois, as well as was the suit against Jacobs in Illinois, that the Supreme Court of Illinois would have reached precisely the same result as it has.

Nor can it be doubted that if the suit against Jacobs had been in Michigan as was there the suit against the Company, and had the pleadings and evidence been the same as they were in Illinois that then the Supreme Court of Michigan would have sustained a judgment against Jacobs (assuming that the state of law in Michigan is the same as

it is in Illinois). And such was the assumption which the Supreme Court of Illinois was compelled to indulge in, there being no proof to the contrary in the record.

These last positions well state the tests of these matters.

In counsel's several citations it is clearly seen from the record that had the second suit been in the same state in which the first suit was, that then the result would have been different from that which actually happened in the second suit!

Counsel cannot complain in the case at bar of the procedure in any of the courts. Their client received even more consideration than he was entitled to.

The record fails to show that at the conclusion of all the evidence in the trial court the defendant offered a written instruction to take the case from the jury. It is a settled law in Illinois that a *motion* to that effect is meaningless—there must be a "*written*" instruction.

W. C. S. R. Co. v. *Foster*, 175 Ill., 396, page 398.

In the absence of such a written instruction defendant can not claim here any error which seeks to review the entire record. The fact that later (as in the case at bar, defendant's instruction No. 20) a peremptory instruction is requested mixed in with a series of instructions, does not overcome the last point (p. 398).

Another complaint herein is as to his instructions No. 16 and 18.

Now, so far as concerns their subject-matter, they are erroneous in following respects: No. 16 *assumes* that the litigation in Michigan "was based upon the same cause of "action" as that in Chicago and "involved the same subject-matter."

This is erroneous, as hereinabove shown, that a suit

against one defendant is not the same subject-matter cause of action as a subsequent suit against an entirely different defendant.

It is true that Jacobs got $4,000 from Mrs. Marks and so did under false pretenses and invested these $4,000 in stock of a company, which stock was taken in her name.

This may be conceded, yet in one suit she sues the Company, and in the other suit she sues Jacobs, a very different matter. Suppose Jacobs, after receiving the $4,000, never actually turned it over to the Company, kept it all himself, retained the entire benefit of the transaction. In such case Jacobs would be liable to her either in "case" for his false representations or in assumpsit as having received the money for her use.

The Company could cancel her shares of stock as being unpaid for as Jacobs was her agent to make the payment for her and failed so to do. In such an event she would have no right of action whatever against the Company.

Assume, on the other hand, that Jacobs, after receiving the $4,000 from her, turns it all over to the Company, retains no benefit for himself. In such case he would not be liable to her in assumpsit, but he might still be liable to her in "case." And in such event, too, she might have an action against the Company not, however, in "case," but in assumpsit.

Her money having been obtained by false representations, she could on discovering the fact, rescind all her promises (so long as her money was not yet in the hands of innocent holders *for value*), and after such recision she could recover from any person in whose hands the money be although such person be entirely innocent in the transaction so long as such person has not given anything or changed his condition for the worse.

Further analysis is not needed to show the error in proffered instruction 16, which assumes *as a matter of law* what in any event is question of fact upon the evidence, namely, whether the cause of action in Michigan was the same as that in Chicago. This will depend upon all the circumstances as to some of which we have above surmised.

Suppose the Michigan suit had proceeded to trial and the verdict had been that the "*issues*" were found for the defendant, and judgment on the verdict. This would simply have demonstrated that the *Company* was not *in debt* to Mrs. Marks; it would not have barred her suit against Jacobs for his deceit. How, then, can a mere discontinuance bar her?

A like vice infests proffered instruction 18. It assumes that the cause of action in Michigan and in Chicago were the same, that it was settled and concludes with a peremptory direction to return a verdict for the defendant.

Now, even if the cause of action was the same, yet the special plea calls for more than a *settlement,* it calls for a *satisfaction.* So, too, the common law principle that a release of one of *joint tort feasors* releases the other; calls for more than a *settlement,* it calls for a *release.*

There might indeed be a settlement, and yet not necessarily a release. And still, as we have above shown, defendant received more consideration than he was entitled to in the instructions actually given at his request.

These number 1 to 17, inclusive (omitting numbers 8, 14 and 16).

Of these instructions given it will be seen that No. 17 covers all the elements offered in No. 16 and 18, and presents the same to the fullest extent in defendant's favor. It states that if Mrs. Marks sued the Company in Michigan

to recover the $4,000 involved in "this suit now before you, "and that she made a settlement of this case with the de- "fendant therein, or any one else," then the verdict should be for the defendant.

In spite of this instruction No. 17, the jury found for the plaintiff, thus evidently believing from the "agreement" and what the Supreme Court mentions "the other evi- "dence," that there had been no settlement. Moreover, this instruction No. 17 was erroneous, as even if she settled with the Company it would not release Jacobs.

A settlement is not necessarily a release.

As we show above in

U. S. v. *Haldman*, 91 U. S., 585,

a settlement by agreed judgment is not a release.

Nor anywhere is a *settlement* with one of *joint tort feasors* equal to a settlement with the other. (There must be either actual *satisfaction* or a *release* of the one, in order to be availed of by the other, a mere "settlement" will not do).

This instruction 17, we say, gave the defendant a great deal more than he was entitled to, and yet the jury beat him, and properly so, and under the settled law of Illinois it is not ground for reversal when a jury ignores an erroneous instruction.

McNulta v. *Ensch*, 134 Ill., 46.
W. C. R. Co. v. *Maney*, 170 Ill., 422.

The doctrine invoked by Jacobs is if there be *joint tort feasors* a release of one will release the other; or else again, that any party who has been injured, when obtaining *satisfaction* for such injury, cannot thereafter recover for the same injury from any other party.

Neither of these principles is here applicable.

There is no showing that the corporation and Jacobs *were joint tort feasors,* nor could they be.

A corporation may be held liable by reason of the acts of its representatives, but not because it is acting *jointly with them.* The liability in such a case is upon the doctrine of *respondeat superior;* that is to say, the corporation stands as principal and the representative as agent.

But the corporation, acting *through* its officers, can not be at the same time acting *jointly* with its officers.

There is here no relation of *joint tort feasors,* nor pretended to be.

The next doctrine invoked is that of satisfaction.

But there is no satisfaction.

When Mrs. Marks bought the shares under the false representation of Jacobs, he, Jacobs, became liable to her in damage.

Now we may admit that had she actually sold the shares prior to the trial of the present cause, and had received for the same $2,000, then her damage would not have been so great, and her recovery against Jacobs would have been $2,000 instead of $4,000, and so, had she received $3,000, then her recovery would be only $1,000, and so had she been fortunate enough to sell the shares for $4,000, *and had actually received the money,* then she would have sustained no damage provable at the time of the trial. But suppose she had made an *executory* contract with John Doe, that he would buy her shares for $4,000, and then, before her trial against Jacobs, the said Doe "backed out," shall it be said that she has sustained no damage?

Now we find that she has sued the Company for the amount of $4,000, and as a result of that suit the corpora-

tions enters with her into an "executory" contract under which, if certain things in the future do happen, then the corporation will buy from her her shares. We find, however, that these things did not happen, and the corporation did not buy her shares. By what manner of reasoning can this be said to serve as a satisfaction to her of her loss of $4,000?

It would be a strange doctrine that because Jacobs swindled her and she brought some sort of suit against the corporation into which the money went, which suit she withdrew, receiving not one penny of the money, nor even any binding contract under which she could sue the corporation, that, therefore, she has received satisfaction and thus released Jacobs, himself.

The whole doctrine of releasing one party by release executed to another is obnoxious to our courts and has been frequently so held.

Our courts follow the law as stated by Judge Cooley (to whom we have above referred as the exponent of Michigan law), in his work on Torts, page *139, *et seq.*, that the bar arises not from any particular form that the transaction assumes, but from the "fact that the injured party has *actually* "*received satisfaction.*"

The Supreme Court of Illinois has always held that the *substance* is to be followed and not the form, and hence even where the parties gave actual *releases* and actually state that their claims have been *satisfied*, and even executed instruments *under seal*, yet subsequent litigation is not thereby barred as a matter of law, but the whole question *is left to the jury under proper instructions as one of intent*, and that is to determine whether it was the intent of the parties to release *not only* the person to whom the particular paper

may have been executed, *but also* the person who is subsequently sued.

Our courts have adopted this principle of construction at times, even *against the express language* of instruments under seal. That is to say, they limited such instruments in their efficiency only to that which was intended.

Robinson v. *Stow,* 39 Ill., 568, on page 572, is a strong instance of what we have just said, though not applicable to the particular kind of papers now in question.

City v. *Babcock,* 143 Ill., 358, allows a person to release one (by way of covenant not to sue) without thereby impairing the rights against another *joint tort feasor.* The test being whether the *injury itself had been satisfied. Pages 366 and 367* are particularly apt, and hold that it is a question to be submitted to the jury whether the payment made was intended either to release the other *joint tort feasor,* or to *satisfy the injury itself.*

The following cases of our courts indicate that the expressed language, even in instruments under seal, may be ignored, and the papers not serve as releases, where from all the circumstances it can be seen by the court or jury that the *injury itself was not satisfied* and that the injured party did not intend to release the person who is subsequently sought to be brought into court.

Please consult with reference to the last proposition the following cases:

Parmelle v. *Lawrence,* 44 Ill., 405, particularly page 410.

Moore v. *Stanwood,* 98 Ill., 605, especially 608.

Thomason v. *Clarke,* 31 Ill. App., 404, page 407.

Lumberman v. *Preble,* 50 Ill., 332; please read opinion in full.

The above cases all present instruments under seal, and yet their express language is ignored in order to sustain a recovery against parties who invoke the very principle which now Jacobs invokes, namely, that they shall be released not because they paid anything, not because they gave any consideration, not because they were named in the release, not because equitably they are entitled to a release, nor yet because the injured party has in fact received satisfaction for the injury, but that they should be released simply and solely because of an old and to some extent obsolete and technical doctrine; that the release of one of *joint tort feasors* releases the other.

A doctrine by the way not properly applied as to *joint tort feasors*. It had its origin with joint obligors. A release of one of these would release the other because it deprived the other of *contribution*.

No such principle could exist as to joint wrongdoers, nor should now be considered. As to these even a formal release (but there is none such in our case, simply a "discontinu-"ance" of a litigation), so we say that even a formal release of one would not and should not release the other, as the principle of contribution is not involved.

The only thing which a wrongdoer could use as a defense would be that the injury in question has *actually been satisfied*, and then it could not be by way of defense, but rather by way of diminution or abatement of damages.

Counsel's contention might have some weight if Mrs. Marks had received from the corporation or from any solvent parties an absolute contract under which such party would unconditionally bind himself to buy her stock at $4,000. Counsel's Illinois case might then be applicable.

Or if it had appeared that at the time she tried this pending case against Jacobs that she had then received from

any source $4,000 for her stock, then certainly there could have been no such finding or damages as is here shown, because the sale by her of the stock and the *actual* receipt of the purchase price would have decreased her damage, and so we may admit also that if it had been shown on this trial that she had even a contract with the corporation or any solvent party—nay, indeed, any party, whether solvent or not—under which she could even claim to sell her stock and bring suit if stock be not accepted, that such facts should diminish the amount of damages now recoverable.

But the record fails to show anything of the kind. It simply shows the corporation agreeing that *if* other people paid to it, the corporation, $1,000 by way of stock subscriptions, *then* it, the corporation, would with this $1,000 buy Mrs. Marks' stock.

In other words, there is here not even an executory contract ever to buy her stock, but simply that the corporation will try to find some one else who will buy it.

And the record further shows *that such never came to pass.*

The wildest vagaries of an opium eater would fail to see in this any "satisfaction" of the injury which had been done Mrs. Marks by the deception of Jacobs.

Further it is seen that the other $3,000 should be paid to her by the corporation on the day that the City of Escanaba would turn the property over to the corporation.

This agreement between Mrs. Marks and the corporation was made July 14, 1894.

In this last regard it has reference to the facts shown elsewhere in the record that the City of Escanaba had offered this Company this property in case the Company would there establish its factory.

As the Company failed in December, 1893, it is practically self-evident that the Company would not and could not after July, 1894, succeed in earning the property from the city, and it is shown without contradiction (Rec., 307-308) that almost immediately after this agreement between Mrs. Marks and the Company, the Company itself, through its president, declares her stock worthless, and declares she will never get a cent for it.

Under these circumstances it was clearly a matter of fact, and not of law, whether under any theory Jacobs could claim the release by peremptory instruction upon the ground either that Mrs. Marks had released the corporation or received satisfaction from it.

If anything had been paid by the Michigan corporation to Mrs. Marks by way of consideration, not only in behalf of the corporation, but *also in behalf of Jacobs*—that is to say, if Jacobs was either actually or by intendment *embraced in the consideration*, which Mrs. Marks received (had she received any at all)—then such fact might be considered by the jury upon the proposition that he should also be embraced in the release which the corporation had obtained (had it in fact been released, which it had not).

No case is cited by counsel with facts similar to those here involved, and hence counsel's citations may well be distinguished. But even if they be held as announcing a rule in favor of Jacobs, they must then be considered *simply as in conflict with the Illinois citations by us presented.*

A brief review, however, of counsel's citations may be of interest, even if not of importance.

Their sole case from Illinois, *Simmons* v. *Clark,* 56 Ill., 96, shows that in case certain payments should be made in the future, then one of the parties claimed to be liable should

be released, and it was found that such payment was never made, *and hence that neither that party nor any other was in fact released.*

And so we may say in the case at bar that if the Michigan corporation had ever bought Mrs. Marks' stock for the $1,000 and later for the $3,000, thus a total of $4,000, why, of course, she would have no further action against anyone, because that in fact would wipe out her damage by restoring to her her money. But as the corporation never actually bought, nor indeed obligated itself to buy, but simply said that if certain contingencies should arise, that then it would buy, the matter rests precisely on the same basis as in the *Simmons* case.

Leddy v. *Barney*, 139 Mass., 397, shows that Barney was a superintendent employed by Chace. Barney's neglect injured the plaintiff. The plaintiff made a demand upon Chace and received $150 from Chace in settlement *of the injury*. This was held to be a release of plaintiff's cause of action against Barney.

So far as in the opinion general propositions of law are announced, the case is clearly repugnant to the Illinois authorities.

So far as the *facts* are concerned, the case is clearly distinguishable. The case rests upon

Brown v. *Cambridge*, 3 Allen, 474,

from which on page 476, as also from the reading of both of these cases together, it is learned that the defendant, claiming a release because of some other party being released, must prove the *identity* of the cause of action, and again, must show that there was some *connection* between the person actually released and the person who afterwards claims the benefit of such release.

Thus as where (in the *Leddy* case, *supra*), Chace, the employer, being released it sufficed to release Barney, the employee. The court, in fact, on page 476 of the 3rd Allen, cites with approval the doctrine found in other cases that a "*stranger to the tort*" *can not* claim a release because of the release of some other party.

And, indeed, it would be singular if we should find our property destroyed, and have reason to believe that John Doe was the culprit, and in a suit against him he should conclusively prove an *alibi*, and have a judgment of not guilty, or if, indeed, without going to judgment, we should execute to him a release (having the effect of a judgment in his favor) or we should simply dismiss the suit, that this would bar our right to bring an action against Richard Roe, as to whom we may possess sufficient evidence as to guilt. The authorities have never so held, and we undertake to say that they never will.

Counsel themselves invoke the case of *U. S. v. Parker*, 120 U. S., 89, (to which we refer above) and which, near the end of the opinion, says that the proceedings in that litigation amounted to a finding that the plaintiff had "no cause of action."

That case involved no third person; it was simply an attempt to sue Parker over again after once suing him.

Now, admit that in our case the prior record shows that Mrs. Mar'ks has *no cause of action* against the *corporation*. This is by no means a holding that she has no cause of action against *Jacobs*, no more than in our above illustration as to our ancient friends Doe and Roe.

The record utterly fails to show any "joint" conduct on the part of Jacobs and the corporation.

It fails to show that Jacobs, at the time of his fraudulent

representations, was either a member or an officer of the corporation. It fails to show that *the corporation* at that time either by Jacobs or at the hands or mouth of another person acted or attempted to act with, or in any manner participated in the false representations. It fails to show that the *corporation* ever authorized Jacobs to utter for it any falsehood.

If Mrs. Marks actually had, or thought she had any right of action against the corporation for the $4,000, which she put into the corporation, induced by the deceptive representations of Jacobs, it would follow that said cause of action, as far as this abstract shows, was not and could not have been because of any *joint act* on the part of Jacobs and the corporation.

In the *Leddy* case, *supra*, Barney was the employe of Chace and acted in the "scope" of his duty; now, even admitting that Jacobs was already a member—even an officer—of the company, we know of no principle which says that he is in the "scope of his duty" when he deceives plaintiff into becoming a co-member with him.

The only remaining principle on which counsel could contend is the one which we freely concede, and we want no better discussion than is given by counsel in *Lovejoy* v. *Murray*, 3 Wall., 1, which we beg your Honors to read in full.

The United State Supreme Court there reviews the authorities, and there decides that a judgment even against one of actual joint tortfeasors *does not release* the others until the *judgment is actually paid, and that too in full.* The court uses the particular expression that the payment must be "*in full.*" (Page 17.)

In other words there must be actual satisfaction for the *injury* itself.

Whether there has been actual satisfaction is for the jury.

Hart v. *Baller*, 15 Sargent & R., 162.

There must be not only accord but actual satisfaction.

Campbell v. *Hurd*, 32 N. Y. Supplement, 377 affirmed 49 N. E., 1104; please read in full. There the costs of litigation were paid by the defendant.

Simmons v. *Clark*, 56 Ill., 96.

And it must be fully *executed*.

Frost v. *Johnson*, 8 Ohio, 395.

Smith v. *Crawford*, 32 N. Y. Supp., 377.

Simmons v. *Clark*, 56 Ill., 96.

transpose

It is apparent that when Mrs. Marks agreed with the corporation to dismiss her suit, and the corporation to dismiss its suit, that neither was given any satisfaction for anything to the other, and then when it was further agreed that the corporation would pay her $4,000, and take her stock, that, and that only, was, or might have been actual satisfaction for the $4,000 which she had lost. But it could be actual satisfaction only in one of two ways, either by her actually receiving $4,000, or else by her receiving a contract entitling her to demand $4,000, and if not paid to bring suit and obtain judgment against the corporation for $4,000. It certainly can not be deemed *actual satisfaction* that the corporation entered with her into a mere tentative contingent executory agreement, that it, the corporation, might find some other person who might put $1,000 into the corporation. In the absence of finding such person the agreement must simply prove in the end altogether nugatory, and even so as to the remaining payment of $3,000, which also would never ripen into a liability unless the corporation received its title deeds clear from the city.

Indeed, even if the corporation had received such titles from the city, it would not have to pay the $3,000 at all

unless it also had found the party ready to put in the $1,000 provided for.

The simple statement of this matter is complete refutation that there ever was any satisfaction for the *injury* in question. The company never found the purchaser for $1,000 of stock, never got title to its property, never paid her a penny, *never released* her from her liability as a stockholder, *could not do so* even if it tried, as such release must come from the *creditors* (that there were such is shown, pages 157-159 of the record); the record, as we remember it, does not even show that the company discontinued its damage suit against her, but supposing it did, it *can commence another*. Surely under these circumstances the "settlement" and the "satisfaction" are hollow mockeries. Please read hereon the opinion of the State Supreme Court.

Livingston v. *Bishop*, 1 Johns., 290, cited by counsel, is also in its facts widely different from the case at bar. In that a master accompanied by his five servants, *all six acting together*, committed a trespass. Judgment being obtained against the master it was held that *until actually paid* it was not a bar to a suit against the servants.

Gunther v. *Lee*, 45 Md., 60, was against three defendants *who acted jointly* in tearing down plaintiff's house; plaintiffs released one, and the court quotes from the release, that plaintiffs for the $500, acknowledged themselves "to "be *fully paid* and *satisfied* for all and singular the tres- "passes complained of"; hence the court concludes there was actual satisfaction in full. (The court also says that the same would be implied, as a matter of law, from an instrument under seal. In this expression the court conflicts with our Illinois cases.)

Brown v. *Marsh*, 7 Vermont, 320, cited by counsel, was a case in which Temple and Marsh were *charged with con-*

spiracy (*i. e.*, with a *joint* act). Plaintiff desiring to use Temple as a witness, gave him a release so as to remove the objection of being interested. It is held that Marsh could avail himself of the release.

The case might be somewhat in point in fact (though contrary in principle to our citations), had Mrs. Marks sued or claimed against *Neufeld* (Jacob's associate in the fraud) and Jacobs as joint actors, and then released Neufeld It will be remembered that there is nothing to show that she ever sued or claimed against the *corporation* and Jacobs as joint actors.

Hopkinson v. *Shelton*, 37 Ala., 311, was trover by Hopkinson against Shelton (a Sheriff); the court finds that the same subject-matter had been adjudicated in a prior litigation by the same Hopkinson (and another as plaintiffs) against the same Sheriff.

The case might be near ours had Mrs. Marks ever sued Jacobs (together with the corporation) and reached an adjudication and later sought to sue Jacobs alone.

Respectfully submitted.

JOHN F. DILLON,
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ANDREW J. HIRSCHL and
JOHN W. BYAM,
Of Counsel.

Supreme Court of the United States.

No. 410.—October Term, 1900.

Lewis Jacobs, Plaintiff in Error, vs. Dora Marks. } In error to the Supreme Court of the State of Illinois.

[May 27, 1901.]

In June, 1896, Dora Marks brought an action in the circuit court of Cook County, Illinois, against Lewis Jacobs, for false representations and deceit whereby the plaintiff had been induced to become a member of a corporation known as the Chicago Furniture and Lumber Company of Escanaba, Michigan, composed of said Jacobs and one Nathan Neufeldt, and to pay into such concern the sum of $5,000. The plaintiff sought to recover in this action the money so expended by her, alleging that the shares of stock so taken by her in said company were worthless.

The defendant filed a demurrer to the declaration, which was overruled, and thereupon he filed a plea of not guilty, and also several special pleas, in which he set up, in substance, that the plaintiff, on or about December 4, 1893, instituted an action in the circuit court of Delta County, Michigan, against the Chicago Furniture and Lumber Company, to recover the sum claimed in the present suit; that service was duly had upon said company, which entered its appearance, and said court acquired jurisdiction of the parties to said cause and the subject-matter thereof; that, afterwards, the said parties came to a settlement of said cause; that, on July 25, 1894, the said court entered the following order: "This cause having been settled, it is hereby discontinued by consent of both parties, without cost to either party;" and that the said plaintiff had, therefore, received full satisfaction of the claim upon which the present suit is based. These special pleas were traversed, and the trial resulted in a verdict in favor of the plaintiff for $4,000. At the trial of the present case the plaintiff put in evidence a written agreement between the Chicago Furniture and Lumber Company and Dora Marks, in the following terms:

"Articles of agreement made and entered into this 14th of July, A. D. 1894, by and between the Chicago Furniture and Lumber Company, a corporation, of the city of Escanaba, Delta County, Michigan, parties of the first part, and Dora Marks of Denver, Colorado, party of the second part. Party of the first part agrees to purchase the twenty thousand dollar ($20,000) worth of stock of the said Chicago Furniture and Lumber Company, which the party of the second part holds, for the sum of

$4,000, to be paid for as follows: $1,000 to Mead and Jennings, attorneys for said party of the second part, as soon as the parties of the first part dispose of their treasury stock to the amount of $1,000 or interest other capital in said company to the amount of $1,000 and $3,000 to said party of the second part, on the day that the plant now occupied by the parties of the first part in said city of Escanaba is turned over to them, and a clear title to the property earned by them. Parties of the first part further agree to discontinue the damage suit now pending against the party of the second part without cost. Said parties of the first part further agree to release said party of the second part from all liability of said second party for the balance due on unpaid stock. Party of the second part agrees to sell her said stock of $20,000 to the parties of the first part and accept payment as aforesaid mentioned. Party of the second part also agrees to discontinue the suit now pending under attachment proceedings against party of the first part, without cost. Said stock to be transferred as paid for.

"In witness whereof the parties have hereunto set their hands and seals the day and year first above written."

Thereupon, over the objections of the defendant Jacobs, the plaintiff was permitted to testify that the company never carried out the agreement under which the suit was brought, and that she never recovered a single dollar in satisfaction of her claim. The defendant requested the court to instruct the jury that the settlement of the Michigan case constituted a bar to this action. These instructions were refused, and the trial resulted in a verdict and judgment in favor of the plaintiff in the sum of $4,000.

The cause was taken to the Appellate Court of Illinois, which first reversed, and then, on rehearing, affirmed, the judgment of the trial court; and, afterwards, to the Supreme Court of Illinois, which, on December —, 1899, affirmed the judgment of the Appellate Court. A writ of error was thereupon allowed by this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

The plaintiff in error alleges error in the action of the Illinois courts in failing to give full faith and credit to the judicial record and proceedings of the circuit court of Delta County, Michigan.

A contention is made on behalf of the defendant in error that the decision of the State Supreme Court did not rest on a Federal question, and that, hence, under the doctrine of *Seeberger* v. *McCormick*, (175 U. S. 274,) and cases therein cited, we have no jurisdiction to review it.

But the record discloses that, at the trial in the circuit court of Cook County, the defendant, after having put in evidence the record of proceedings in the circuit court of Delta County, Michigan, wherein Dora Marks was plaintiff and the Chicago Furniture and Lumber Company was defendant, asked the court to give the following instruction:

"You are instructed that if you find from the evidence that the plaintiff herein instituted a suit in the circuit court of Delta County, Michigan, against the Chicago Furniture and Lumber Company for the purpose of recovering the $4,000 involved in this suit now before you, and that she made a settlement of this cause with the defendant therein or any one else, that the plaintiff is barred from the further prosecution of this suit, and the verdict of the jury must be for the defendant." And, in support of the motion for a new trial, it appears that the defendant alleged that "the verdict and action of the court fail to give full faith and credit to the judgment of the circuit court of Delta County, Michigan, in the case of *Dora Marks* v. *The Chicago Furniture and Lumber Company*, contrary to art. 4, sec. 1, of the Constitution of the United States, which provides: 'Full faith and credit shall be given in every State to the public acts, records and judicial proceedings of every other State.'"

It also appears that, in the tenth assignment of error filed in the Appellate Court, it was alleged that the Circuit Court had erred in failing to give full faith and credit to the judgment, records and judicial proceedings of the circuit court of Delta County, Michigan, as required by the Constitution of the United States.

It further appears that, in the assignment of errors filed in the Supreme Court of Illinois to the judgment and action of the Appellate Court, it was alleged that the Appellate Court erred in "not reversing said judgment by reason of the error of the Circuit Court in failing to give full faith and credit to the judgment and judicial proceedings of the circuit court of Delta County, Mich.," and also error was alleged in that "the Appellate Court erred, as did the Circuit Court, in failing to give full faith and credit to the judgment of the circuit court of Delta County, Michigan, rendered in the case of *Dora Marks* v. *The Chicago Furniture and Lumber Company*, and introduced in evidence in this cause, which judgment is as follows: 'This cause having been settled, it is hereby discontinued by consent of both parties without cost to either party,' as required by article four, section one, of the Constitution of the United States."

And it is assigned for error in this court that the courts below failed to give full faith and credit to the judicial records and proceedings of the circuit court of Delta County, Michigan, in the case of *Dora Marks* v. *The Chicago Furniture and Lumber Company*, and thus deprived the plaintiff in error of his rights and privileges under said article 4, section 1, of the Constitution of the United States; and, indeed, this is the sole error relied on here by the plaintiff in error.

We think, therefore, that the question whether the record and judicial proceedings in the Michigan court received full faith and credit in the courts of Illinois is one for us to consider and determine, and we hence

decline to dismiss the writ of error. (*Green* v. *Van Buskirk*, 5 Wall. 314; *Carpenter* v. *Strange*, 141 U. S. 87, 103; *Huntington* v. *Attrill*, 146 U. S. 657, 684.)

We come, then, to the question whether, upon the facts disclosed in this record, the courts of Illinois gave full faith and credit, within the meaning of the Constitution of the United States, to the judgment and judicial proceedings of the State court of Michigan.

And, first, what was the case made by the pleadings?

The declaration was in action on the case, and alleged that the defendant induced the plaintiff, by false and fraudulent representations, to join him and one Neufeldt in a scheme to form a corporation for the purpose of carrying on the business of the manufacture and sale of furniture in the town of Escanaba, in the State of Michigan, and to furnish and pay to the defendant the sum of $5,000, for which the plaintiff was to receive shares of stock in the proposed company; that, relying on the said false and fraudulent representations, (the nature of which were stated in the declaration,) the plaintiff paid over the said sum of $5,000, and became a member of the corporation known as the Chicago Furniture and Lumber Company, composed of the plaintiff, the defendant and said Neufeldt; that, owing to the fact that the said representations as to the defendant and Neufeldt putting in large sums of money into the enterprise proved to be false and untrue, as the defendant well knew, the shares of stock taken by plaintiff were valueless, and so the defendant falsely deceived and defrauded the defendant, to her damage in the sum of ten thousand dollars.

To this declaration the defendant pleaded the general issue of not guilty, and several special pleas, setting forth, in several phases, that after the making of the said alleged false representations by the defendant, and after the plaintiff had parted with her money on the strength thereof, as set out in the declaration, the plaintiff, on or about the 4th of December, 1893, instituted an action in the circuit court of Delta County, Michigan, against the Chicago Furniture and Lumber Company, whereby she sought to recover from said company the sum of four thousand dollars, which she asserted the said company owed her as having been fraudulently contracted and procured; that the company was served and appeared; that afterwards the plaintiff and the defendant company came to a settlement of the said cause of action, and an order was duly entered on July 25, 1894, in said circuit court of Delta County, Michigan, in the following terms:

"This cause having been settled, it is hereby discontinued by consent of both parties without cost to either party;" that the said cause of action set forth in the declaration in this cause is brought upon the same claim upon which the said action was brought by the said Dora Marks against

the said Chicago Furniture and Lumber Company; that thus "the plaintiff has received satisfaction and payment of her said claim; and this the defendant is ready to verify."

To these special pleas the plaintiff filed a replication, alleging that the cause of action set forth in her said declaration was not the same claim as that sued on by the plaintiff against the Chicago Furniture and Lumber Company in the circuit court of Delta County, Michigan, and that she, the plaintiff, did not, nor has she at any time received satisfaction of her said claim sued on herein, and of this put herself upon the country.

In the trial of the issues thus made up the defendant put in evidence a certified copy of the proceedings in the Michigan court, and the plaintiff, in connection therewith, put in evidence an agreement between the Chicago Furniture and Lumber Company and Dora Marks, in the following terms:

"Articles of agreement made and entered into this 14th day of July, A. D. 1894, by and between the Chicago Furniture and Lumber Company, a corporation, of the city of Escanaba, Delta County, Michigan, parties of the first part, and Dora Marks, Denver, Colorado, party of the second part. Party of the first part agrees to purchase the twenty thousand dollars' worth of stock of the said Chicago Furniture and Lumber Company, which the party of the second part holds, for the sum of $4,000, to be paid as follows: $1,000 to Mead & Jennings, attorneys for said party of the second part, as soon as the said parties of the first part dispose of their treasury stock to the amount of $1,000 or interest other capital in said company to the amount of $1,000, and $3,000 to said party of the second part, on the day that the plant now occupied by the parties of the first part in said city of Escanaba is turned over to them and a clear title to the property earned by them. Parties of the first part further agree to discontinue the damage suit now pending against the party of the second part without cost. Said parties of the first part further agree to release said party of the second part from all liability of said second party for the balance due on unpaid stock. Party of the second part agrees to sell her said stock of $20,000 to the parties of the first part and accept payment as aforesaid mentioned. Party of the second part also agrees to discontinue the suit now pending under attachment proceedings against party of the first part without cost. Said stock to be transferred as paid for."

On July 21, 1897, the jury found the defendant guilty, and assessed the plaintiff's damages at four thousand dollars, and on November 29, 1897, after a motion for a new trial had been made and overruled, a final judgment was entered according to the verdict.

As already stated, the judgment of the Circuit Court was affirmed by the Appellate Court, whose judgment was affirmed by the Supreme Court of Illinois.

It is, of course, obvious that none of the errors assigned to the rulings of the trial court, in the admission or rejection of evidence, or to its

instructions to the jury, nor those assigned to the judgments of the Appellate and Supreme Courts, can be considered by us except as they affect the question of the legal import of the Michigan judgment, as concluding the controversy between the parties in the Illinois courts.

The trial court did not reject the record of the proceedings in the Michigan court as evidence entitled to be considered by the court and jury in the Illinois court. Did those proceedings disclose that the cause of action in the Michigan court was, in legal contemplation, the same with that asserted in the Illinois court? Did they disclose that the plaintiff, by making the settlement therein, had received satisfaction of her claim against Jacobs asserted in the present action? Did they disclose that the plaintiff, by bringing and discontinuing an action against the furniture company, accept the agreement of July 14, 1894, as a satisfaction of her alleged claim, and did such conduct on her part operate as a release of that company, and, if so, did the release operate in favor of the defendant in the present suit?

So far as these questions involve matters of fact they are concluded by the verdict of the jury. That verdict imports, under the issues formed by the pleadings, that the claim asserted against the corporation in the Michigan court was not the same with that asserted against Jacobs in the circuit court of Illinois, and that, whether or not the claims were the same, the plaintiff never received payment or satisfaction of her claim.

The plaintiff in error, therefore, is bound to maintain that, as a necessary implication of law, regardless of the verdict of the jury, the two actions asserted the same claim, and that the judgment and proceedings in the Michigan court precluded the plaintiff from maintaining a subsequent suit against the defendant in the Illinois court.

It is, no doubt, true that the object of the plaintiff was the same in both suits, namely, to be indemnified for the loss incurred by putting her money into the venture, but it does not follow that the causes of action were the same. Apparently, the theory of her action against the company was to treat the money advanced as a loan made to the company and induced by false representations. But if she found herself mistaken in her choice of a remedy, she was not thereby deprived of a right of redress against the person who had deceived her. It is, however, contended that she was entitled to but one satisfaction, and that the legal import of the judgment in the Michigan court is that she had received a satisfaction of her claim in that suit. But we think that the judgment in question did not necessarily import that the plaintiff had received satisfaction of her claim. The recital that the cause had been settled was not an adjudication by the court. It evidently had reference to the agreement of July 14, 1894, which was matter *de hors* the record, and with which the court had nothing to do. The entry that the "cause is hereby discontinued by consent

of both parties, without cost to either party," although entered as a judgment of the court, do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. The case of *Halderman* v. *United States*, (91 U. S. 584,) is quite in point. There a judgment entry in the words "dismissed agreed" was pleaded, in a subsequent action, as a former recovery, but it was held by the Circuit Court and by this court that such an entry did not sustain the plea. It was said by Mr. Justice Davis, delivering the opinion:

"It is a general rule that a plea of former recovery, whether it be by confession, verdict or demurrer, is a bar to any new action of the same or the like nature for the same cause. This rule conforms to the policy of the law, which requires an end to the litigation after its merits have been determined. But there must be at least one decision on the *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. Conceding that this action is between the same parties as well as for the same subject-matter as the former one, are the United States barred from a recovery by reason of anything alleged in the pleas? The first, second and fourth pleas are not essentially different. In each the judgment relied on is 'that the said suit is not prosecuted and be dismissed.' This entry is nothing more than the record of a nonsuit, although the customary technical language is not used. But the plaintiffs in error deny that this is the effect of the order, and insist that the pleas present a case of *retraxit*, by which the United States forever lost their action, because they voluntarily announced to the court that, on the defendants paying the costs, the suit be dismissed. Such an announcement does not imply that they had no cause of action, or, if they had, that they intended to renounce it, or that it was adjusted. Nonsuits are frequently taken on payment of costs by the adverse party, in order that the controversy may be arranged out of court; but they do not preclude the institution and maintenance of subsequent suits in case of failure to settle the matters in dispute. . . . Whatever may be the effect given by the courts of Kentucky to a judgment entry 'dismissed agreed,' it is manifest that the words do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. Suits are often dismissed by the parties; and a general entry is made to that effect, without incorporating in the record, or even placing on file, the agreement. It may settle nothing, or it may settle the entire dispute. If the latter, there must be a proper statement to that effect to render it available as a bar. But the general entry of the dismissal of a suit by agreement is evidence of an intention, not to abandon the claim on which it is founded, but to preserve the right to bring a new suit thereon, if it becomes necessary. It is a withdrawal of a suit on terms, which may be more or less important. They may refer to costs, or they may embrace a full settlement of the contested points; but, if they are sufficient to bar the plaintiff, the plea must show it."

Such views apply still more strongly in the present case, because, as we have seen, the parties in the two suits were not the same, and because the agreement which led to the discontinuance of the suit in the Michigan

court proved, when produced at the trial of the present suit, to have been executory in its terms, and not, in any sense, a renunciation of the plaintiff's claim. It was also shown, to the satisfaction of the jury, that this agreement was never fulfilled by the company, and that the plaintiff had never received the money therein promised.

The case above cited also answers the contention of the plaintiff in error that it was not competent for the plaintiff to show that the discontinuance of the suit in Michigan was induced by an executory agreement on the part of the defendant company, and that such an agreement had not been fulfilled. If the defendant, instead of going to trial on the plaintiff's replication that she had never satisfaction of the claim sued on, had demurred thereto on the ground that it was not competent to contradict the legal import of the Michigan judgment by the evidence offered, upon the principle of the case cited the demurrer must have been overruled.

We are of opinion that the trial court did not err in permitting the plaintiff to show that the entry of discontinuance in the Michigan case was not intended by the parties as a release and satisfaction of the cause of action, but was the result of a promissory agreement on the part of the defendant company which was never complied with. Such evidence was competent to support the plaintiff's replication to the defendant's plea in the present suit, that the plaintiff had received full satisfaction and payment of her said claim. In admitting such evidence the court did not refuse to give full faith and credit to the Michigan judgment, but properly allowed evidence, not to contradict the necessary legal import of that judgment, but to show the real meaning of the parties to that suit in agreeing upon its discontinuance.

As against the case of *Halderman* v. *United States*, the counsel for the plaintiff in error cite the subsequent case of *United States* v. *Parker*, (120 U. S. 89, 96,) which they contend must be understood as overruling the prior case. In this view of the two cases we do not agree.

In the latter case the question arose whether a former judgment in a suit by the United States against Parker as principal and Stuart as surety, upon an official bond, was a judgment of nonsuit, which would have permitted the United States to bring another action, or whether it was equivalent to a *retraxit*, by which the United States forever lost their action, and the latter was held.

But this court did not thereby disapprove of the doctrine of the Halderman case, or depart from its reasoning, as is seen in the fact that that case was cited, with others, as establishing the principle that a nonsuit is not conclusive as an estoppel, because it does not determine the right of the parties. This court in discussing the facts of the case, (after quoting the text of the Practice Act of Nevada, in which State the action had been tried,) said:

"It thus appears that there are five instances in which the dismissal of an action has the force only of a judgment of nonsuit; 'in every other case,' the statute provides, 'the judgment shall be rendered on the merits.' If the case at bar is not included among the enumerated cases in which a dismissal is equivalent to a nonsuit, it must therefore be a judgment upon the merits. In the present case the suit was not dismissed by the plaintiff himself before trial, nor by one party upon the written consent of the other, nor by the court for the failure of the plaintiff to appear on the trial, nor by the court at the trial for an abandonment by the plaintiff of his cause; neither was a dismissal by the court upon motion of the defendant, on the ground that the plaintiff had failed to prove a sufficient case for the jury at the trial. The judgment was rendered upon the evidence offered by the defendants, which could only have been after the plaintiff had made out a *prima facie* case. That evidence was passed upon judicially by the court, who determined its effect to be a bar to the cause of action. This was confirmed by the consent of the attorney representing the United States. The judgment of dismissal was based on the finding of the court, as matter of fact and matter of law, that the subject-matter of the suit had been so adjusted and settled by the parties that there was no cause of action then existing. This was an ascertainment judicially that the defense relied on was valid and sufficient, and consequently was a judgment upon the merits, finding the issue for the defendants. Being, as already found, for the same cause of action as now sued upon, it operates as a bar to the present suit by way of estoppel."

This statement of the facts and law in that case clearly shows that the decision is not inconsistent with that announced in the case of *Halderman* v. *United States*, and also that it is not applicable to the case in hand.

These views dispose of the only question which our jurisdiction enables us to review.

Finding, as we do, that the courts of Illinois gave all that faith and credit to the judgment and judicial proceedings in the Michigan court to which they were entitled under the Constitution of the United States, the other errors assigned we cannot consider, and the judgment of the Supreme Court of Illinois is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.